REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS,

FROM MICHAELMAS TERM, 48 GEO. III. 1807,
TO EASTER TERM, 49 GEO. III. 1809,

BOTH INCLUSIVE.

With Tables of the Cases and Principal Matters.

By WILLIAM PYLE TAUNTON,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. I.

LONDON:

PRINTED FOR J. BUTTERWORTH AND SON, LAW-BOOKSELLERS, FLEET STREET;

AND J. COOKE, ORMOND-QUAY, DUBLIN.

1814.

Printed by E. W. Morris, High Wycombe.

JUDGES

OF THE

COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

Right Hon. Sir JAMES MANSFIELD, Knt. Ld. Ch. J.

Hon. JOHN HEATH, Esq.

Hon. Sir GILES ROOKE, Knt.

Who died in Hilary Vacation 1808, and was succeeded by

Hon. Sir SOULDAN LAWRENCE, Knt.

Hon. Sir ALAN CHAMBRE, Knt.

ERRATUM.

Page 134 line 10: *for* 27 H. 7. *read* 27 H. 6.

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TABLE

OF THE

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

N. B. The Cases, the Names of which are printed in *italics*, are printed or cited from MS. Notes.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term,

In the Forty-eighth Year of the Reign of GEORGE III.

DONELLY *v.* Sir HOME POPHAM.

Nov. 11.

A commodore who appoints a captain under him, without having authority for that purpose, is not entitled to share as a flag-officer in the distribution of prizes, under his Majesty's proclamation of the 7th July 1803. Neither will the subsequent ratification of such appointment, by the Lords of the Admiralty, or the King in council, entitle him to share as a flag officer, in any prizes taken before the date of such ratification.

THIS was an action for money had and received, &c. to which the Defendant pleaded the general issue. The cause was tried before *Mansfield* Ch. J. at the sittings after last *Trinity* term at *Westminster*. The facts were as follow. The Defendant, in the month of *July* 1805, was directed by the Lords of the Admiralty to proceed to *Madeira* for the purpose of taking the command of the squadron assembled at that island for an attack upon the *Cape of Good Hope*. He received at the same time the following appointment of *Commodore*—"Whereas we think fit that you should hoist a broad pendant on board his Majesty's ship *Diadem*, so soon as you shall have left the island of *Madeira*, you are hereby authorized and directed to hoist a broad pendant accordingly, and to

wear

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wear the same in the absence of a flag officer until you shall receive further orders. Given, &c."

Upon the sailing of the fleet from *Madeira* the Defendant appointed Captain *Downman* to the command, *as captain under him*, of his Majesty's ship *Diadem*, and he wrote to inform the Lords of the Admiralty of the step he had taken, and of the reasons which had led to it. Their Lordships expressed their disapprobation of the appointment, refused to confirm it, and ordered the Defendant to resume the command of the *Diadem*. The Defendant, upon his return to *England*, appealed by memorial to the King in Council, and that appeal was still depending at the time of the trial and of this motion. By the stat. 45 *Geo.* 3. *c.* 72. *s.* 2. it is enacted, that all prizes taken by any ship or vessel of war in his Majesty's pay shall be the property of the captors, "to be divided in such proportions and after such manner, as his Majesty, by his proclamation of the 7th of *July* 1803, hath already ordered and directed, or as his Majesty, his heirs and successors, shall think fit to order and direct, by proclamation or proclamations to be issued for those purposes;" and, by the proclamation of the 7th of *July* 1803, to which the act refers, it is ordered that "commodores, *with captains under them*, shall be esteemed as *flag officers* with respect to the eighth part of prizes taken, whether commanding in chief or under command." A commodore is appointed either with or without *a captain under him*, according to the opinion entertained of the nature and exigencies of the service upon which he is employed. In the former case the appointment is as follows: "By the commissioners, &c. Whereas we think fit that you should hoist a broad pendant on board his Majesty's ship ———, and *have a captain under you*; you are hereby required and directed to hoist a broad pendant accordingly, and to wear the same in the absence of a

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senior captain, until you receive further orders. Given," &c.

The only material question upon the trial was, whether the Defendant, Sir *Home Popham*, was a *flag officer* within the meaning and terms of this proclamation. The Plaintiff, Captain *Donelly*, commanded the *Narcissus* frigate, one of the fleet placed under the orders of the Defendant. The *Narcissus* was dispatched by the commodore to obtain intelligence; and, while absent on that service, she captured a brig, and drove on shore a corvette, belonging to the enemy. After the reduction of the *Cape*, the squadron was employed in an attack upon the *Spanish* settlements on the *Rio de la Plata*, and the Plaintiff was appointed by the Defendant to bring home a part of the treasure taken upon that occasion. He had received on this account a freight of *two per cent.* according to the usage of the navy. It was admitted that, by the same usage, the Defendant would be entitled to one-third of this sum if he were a *flag officer* at the time when then the treasure was transmitted. He would also, in the same character, have a claim on the Plaintiff for 142*l.* 3*s.* 6*d.*, as *head money*, on account of the two vessels which had been captured and destroyed by the *Narcissus* during her absence from the rest of the squadron. These sums, amounting to 2001*l.* 17*s.* 2*d.*, had been paid by the Plaintiff to the use of the Defendant, subject to the determination of the above question. Admiral *Rainier* stated that he had served as a commodore in the *East Indies*; that he was at first appointed *without a captain under him*; but that, after an interval of about a year, he received a new order to hoist a broad pendant and *to have a captain under him*: that, during the first period, he shared equally in the distribution of prizes with the other captains of the squadron, but that, upon his second appointment, he received the proportion of a *flag officer*. Several other officers were

 called,

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called, who spoke to the same effect. The jury found a verdict for the Plaintiff. Damages 2004*l.* 17*s.* 2*d.*

Bayley Serj. moved for a rule to shew cause why the verdict should not be set aside and a new trial granted. He observed, that the Defendant was *de facto* a commodore, *with a captain under him,* from the time of the appointment of Captain *Dowuman* to the command of the *Diadem.* The measure was occasioned by the exigencies of the service; and though the Lords of the Admiralty had disapproved of the appointment, and had refused to confirm it, yet the Defendant had appealed from their determination to the King in Council. There was reason to believe that the decision would be favourable to the Defendant. This would establish the validity of the appointment, and the Defendant would then be entitled to share as a *flag officer* according to the terms of the proclamation.

MANSFIELD Ch. J. This is an action between two meritorious officers, who are desirous only of ascertaining their respective rights. It appeared upon the trial that there were two distinct forms made use of by the Lords of the Admiralty for the appointment of a commodore. The officer to whom the order is addressed is sometimes directed merely to hoist a broad pendant, at others to hoist a broad pendant and *to have a captain under him.* The king's proclamation, which regulates the division and distribution of prizes, directs that commodores with *captains under them* shall rank as *flag officers*; and this proclamation is to be considered as incorporated into, and forming part of the prize act. It is by this proclamation, coupled with the act, that the legal rights of the parties are to be determined; and the terms are too plain to admit of the least degree of doubt. It was also proved, in conformity with the clear language

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of the law, that Admiral *Rainier*, under his first authority, shared equally with the other captains of the fleet; but that afterwards, upon his appointment as commodore with *a captain under him*, he received the proportion of a *flag officer*. Had the Lords of the Admiralty even confirmed the appointment of Captain *Downman* to the command of the *Diadem*, though this might have operated upon the rights of the parties from the time of such confirmation, yet it could not have been attended with a retrospective effect. The same observation will apply to the appeal. The legal rights of the claimants, as they at present subsist, cannot be affected by any future decision of the King in Council. It may also be remarked, that if the approbation of the Lords of the Admiralty, or of his Majesty in Council, were to have the effect contended for, it might be productive of serious inconvenience to the public service. For there would be reason to apprehend that officers might be induced to make appointments of this nature merely with a view to their own emolument, taking the chance of their being afterwards ratified.

HEATH J. The decision of the King in Council cannot divest a right.

CHAMBRE J. was of the same opinion.

Bayley took nothing by his motion.

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BRANTON and Others, Assignees of JEYES, a Bankrupt, v. TADDY and Others, Executors of LYALL.

Where one of two partners underwrites policies of insurance upon ships, &c. in his own name, but upon their joint account, contrary to the 6 *Geo.* 1. *c.* 18. *s.* 12., no action can be maintained to recover the premiums upon such policies from the assured.

THIS was an action brought to recover the sum of forty-eight pounds, ten shillings, claimed to be due for premiums of insurance on certain policies underwritten by the bankrupt for the deceased. The defendants pleaded the general issue. Upon the trial of the cause before *Mansfield* Ch. J., at the Sittings after last *Trinity* term at *Guildhall*, it appeared that *Jeyes* and a person of the name of *Metcalfe* carried on the business of oilmen in partnership; and it was proved, upon the cross-examination of a witness called on the part of the Plaintiffs, that, by agreement between *Jeyes* and *Metcalfe*, whatever profits should arise upon the policies underwritten by *Jeyes* were to be divided between them. It was objected upon this evidence, that by the statute 6 *Geo.* 1. *c.* 18. *s.* 12. the transaction was illegal, and that the Plaintiffs therefore could not recover. The Chief Justice being of that opinion, they were accordingly nonsuited.

Shepherd Serj. moved for a rule to shew cause why the nonsuit should not be set aside and a new trial granted. He admitted that, as between *Jeyes* and *Metcalfe*, no action could be sustained. That point had already been decided. But *Metcalfe* was not a party to the contract upon which the present action was founded: that contract was between *Jeyes* singly, on the one side, and *Lyall*, the deceased, upon the other. In case of a loss the action must have been brought against *Jeyes* alone, and he was alone entitled to sue for the premiums. The validity of the contract between *Jeyes* and *Lyall* could not be affected by any appropriation which the former might

think

think proper to make of his profits. At all events the Court would not permit those who had received the benefit of the insurance to avail themselves of such an objection.

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MANSFIELD Ch. J. It appeared upon the trial that *Metcalfe* and *Jeyes* were partners, and that these insurances were effected on their joint account. The law says that "no persons acting in partnership shall presume to underwrite any policy for assuring ships or merchandizes at sea, but that every such policy shall be *ipso facto* void." How then can an action be maintained to recover these premiums? The statute would be mere waste paper, if one of several partners might underwrite a policy for the rest.

The other Judges concurring,

Shepherd took nothing by his motion.

See *Booth* v. *Hodgson*, 6 *Term Rep.* 405. and *Mitchell* v. *Cockburne*, 2 *H. Bl. Rep.* 379.

HILL v. TUCKER, one, &c.

Nov. 11.

Where bail call together upon an attorney, and employ him to surrender their principal, one of them cannot afterwards maintain a separate action against the attorney for neglecting to effect the render pursuant to his undertaking.

THE Plaintiff and a person of the name of *Bailey* had entered into a recognizance of bail for one *Thomas Parsons* in a suit depending against him in this court. The present action was brought against the Defendant, an attorney, for neglecting to render *Parsons* in discharge of his bail. The cause came on before *Chambre* J., at the Sittings after last *Trinity* term at

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Westminster. It appeared that besides the suit again *Parsons* in this Court, several other actions were, at the same time, depending against him in the *King's Bench*, to all which he had put in bail. The Plaintiff, *Bailey*, and the rest of the bail, were desirous of rendering him; and for this purpose they applied to the Defendant, who was *Parsons*'s attorney. He refused to undertake the business unless they would advance 25*l.* *Bailey* immediately paid 24*l.* 10*s.*, with which the Defendant was satisfied. It did not clearly appear whether any part of this money was contributed by *Hill*; but nothing was paid by the other bail. The Defendant afterwards rendered *Parsons*, in discharge of his bail, in all the actions which had been brought against him in the *King's Bench*; but neglected to do it in the action depending in this court, in which the Plaintiff and *Bailey* were bail. The learned Judge was of opinion that this was a joint contract with the Plaintiff and *Bailey*, and he accordingly directed a nonsuit.

Shepherd Serjt. moved for a rule *nisi* to set aside the nonsuit, and for a new trial. The question is, Whether the Plaintiff can maintain a separate action for the injury which he individually has sustained by the neglect of the Defendant. The Plaintiff and several other persons went together to the office of the Defendant, for the purpose of employing him to render *Parsons* in the actions in which they were respectively bail. But the mere circumstance of their accompanying each other on this occasion cannot make it a joint contract. From the nature of the business to be performed, and the distinct interest of the parties, it must be considered as the separate retainer of each. Each was desirous of being freed from his own individual responsibility; and that was the object of the application to the Defendant. Suppose two persons, having separate rights of action, go together to an attorney,

torney, pay him a sum of money, and direct him to institute proceedings in their behalf, and that afterwards, in the prosecution of one of the suits, the attorney is guilty of gross negligence; it will not be said that under such circumstances the injured party could not maintain a separate action for his own individual loss. The retainer must be taken *reddendo singula singulis*, and the same principle will apply to the present case.

MANSFIELD Ch. J. The Plaintiff and *Bailey* both employed the Defendant to render *Parsons*. In consequence of this retainer an undertaking is raised by implication of law. The question then is, What undertaking will the law, under these circumstances, imply? Thes ituations and interests of *Hill* and *Bailey* were the same; they were mutually responsible for each other; the act to be done would operate equally in favour of each; the one could not be relieved from his liability without the other. It is impossible then to distinguish the retainer by the Plaintiff from thatb y *Bailey*; and the retainer being joint, the law will, therefore, imply a correspondent undertaking.

HEATH J. was of the same opinion.

ROOKE J. If *Hill* may maintain a separate action, so also may *Bailey*.

CHAMBRE J. It did not very clearly appear that any part of the money was advanced by *Hill*. But, taking the case most favourably for the Plaintiff, and supposing the whole consideration to have been paid by himself and *Bailey*, they were jointly interested, and neither of them, therefore, could maintain a separate action against the Defendant.

Rule refused.

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Kindred v. Bagg, Executor of Parker.

The Court will not set aside a nonsuit on the ground that the case ought to have been submitted to the jury, unless this was desired, on the part of the Plaintiff, at the trial of the cause.

THIS was an action brought to recover 60*l.* for board and lodging provided by the Plaintiff for the Defendant's testatrix. The cause was tried at the last assizes for the county of *Suffolk*, before Lord *Ellenborough* Ch. J., when the Plaintiff was nonsuited.

Shepherd Serj. moved for a rule to shew cause why the nonsuit should not be set aside and a new trial granted. The circumstances stated in support of the motion were as follows. The Plaintiff and Defendant were both relations of the testatrix. She had resided upwards of two years in the Plaintiff's house, and had two apartments, a bed-chamber and a sitting room, appropriated exclusively to her own use. She was provided during the whole of the time with board, washing, &c. at the expence of the Plaintiff. A short time before her death she removed to other lodgings. The learned Judge inquired of the counsel for the Plaintiff whether they could shew that any demand of payment had been made upon the testatrix in her lifetime, or any account delivered in which this charge had been made, or whether there had been any admission of the debt. Upon being answered in the negative, his Lordship observed that this seemed to be a case in which the Plaintiff had gratuitously entertained a relation in expectation of becoming the object of her bounty at her death. He was of opinion, therefore, that the action could not be maintained, and directed that the Plaintiff should be nonsuited. Upon this statement it was contended in support of the present motion, that the learned Judge ought not to have directed a nonsuit, but that the question should have been submitted to the jury. It was their province to have drawn

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drawn the inference, if the facts proved upon the trial would, in their opinion, have warranted it. Had they found that the board and lodging were provided under the circumstances and with the view which had been supposed, the law would then have attached. But this was a fact for their determination. The want of evidence either of a demand made by the Plaintiff, or of any admission of the debt on the part of the testatrix, was not, in itself, a sufficient ground for a nonsuit.

The Court, interposing, inquired whether the counsel for the Plaintiff had expressed a desire that the question should be submitted to the jury; for, unless that were the case, they could not in fairness accede to the present application.

Shepherd said he was not instructed to state that they had desired it, and accordingly

The rule was refused.

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HORFORD v. WILSON.

In an action against the drawer of a bill of exchange, in consequence of the acceptor's default, the Court will leave it to the jury to presume from circumstances (such as the payment of a part of the bill, without any objection to the want of notice, &c.) that notice was regularly given.

The Court will not set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury.

The Defendant promised to pay the Plaintiff 5*l.* "if he would provide a tenant for certain premises, and get him 350*l.* for his lease." The Plaintiff procured one *S.*, with whom the Defendant entered into an agreement, and received 50*l.* as a deposit. *S.* being unable to complete his engagement, the Defendant afterwards consented to release him from the further performance of it, but retained the 50*l.* The Court held that this was a substantial performance of the condition on the part of the Plaintiff, and that he was therefore entitled to recover the 5*l.* from the Defendant.

THIS was an action brought upon a bill of exchange, drawn by the Defendant and indorsed to the Plaintiff, and also upon an agreement, by which the Defendant promised to pay the Plaintiff 5*l.*, "if he would procure a tenant for a certain house belonging to the Defendant, and get him 350*l.* for his lease." The Defendant pleaded the general issue, and delivered a notice of set-off. The cause was tried before *Mansfield* Ch. J. at the Sittings in last *Trinity* term at *Westminster*. The only facts which it is material to state are the following: When the bill became due it was presented for payment to the acceptor, but was dishonoured. The following day *Norris*, the holder of the bill, sent a letter by the two-penny post to inform the Defendant that the bill had not been paid. This letter was not produced upon the trial, nor had the Defendant been served with any notice for that purpose. A short time afterwards *Norris* met the Defendant, who advised him to return the bill to the Plaintiff, from whom he had received it. After the commencement of the action the clerk to the Plaintiff's attorney called upon the attorney for the Defendant to inquire into the particulars of the set-off. The Defendant's attorney at that time informed him that 6*l.* 5*s.* had been paid by the Defendant on account of the bill, but made no objection as to any want of notice to the drawer of the acceptor's default. With respect to the other

part

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part of the Plaintiff's demand, *viz.* that which was founded upon the agreement for the disposal of the house, it was proved that the Defendant procured a person of the name of *Stevens*, who offered to take the house, &c. at 350*l.* An agreement to that effect was prepared; it was signed by *Stevens* and the Defendant, and 50*l.* was paid as a deposit. *Stevens* was not able to complete his contract, and the Defendant consented to liberate him from the performance of the agreement, retaining the 50*l.* as a forfeiture. The jury found a verdict in favour of the Plaintiff for the sum which remained due upon the bill of exchange, and also for 5*l.* upon the agreement relative to the house.

A rule *nisi* was obtained in *Trinity* term for setting aside the verdict and granting a new trial.

Shepherd Serjt. now shewed cause. He observed that the motion was grounded upon two objections. *First*, As to the bill of exchange, that there was no proof that due notice had been given to the drawer of the non-payment of the bill; *secondly*, that the Plaintiff had not performed the condition upon which alone he could be entitled to demand the 5*l.* from the Defendant. As to the *first* objection, the circumstances proved upon the trial amount to a waver of the supposed omission of notice. When the Defendant met the holder of the bill he advised him to return it to the Plaintiff, but said nothing as to the notice. Afterwards the two attornies met; and their conversation related to the bill; but still no objection was made as to any defect of notice. Besides, the Defendant had made a payment on account. If, upon a debt being claimed, a part of it be paid, this, unless there be something to restrain and qualify the effect of the payment, amounts to an admission of the whole demand. Neither, according to the cases of *Lowry* v. *Bourdieu*, *Dougl.* 467. and *Bilbie* v. *Lumley*, 2 *East*.

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2 *East. Rep.* 469., can the Defendant resist the effect of these circumstances by pleading ignorance of the law. As to the *second* objection, he contended that the contract had been performed. The Plaintiff procured a person to take the house, with whom the Defendant was satisfied; for he entered into an agreement with him, and he received 50*l*. by way of earnest. It was true that he afterwards liberated him from the further performance of the agreement, but he retained the 50*l*. This, however, was entirely the Plaintiff's own choice; it was the result of a subsequent arrangement. He might, if he had thought proper, have maintained an action against *Stevens* upon the contract. But he was willing to wave the benefit of the agreement, upon being allowed to retain the 50*l*. This then was a substantial performance of the contract on the part of the Plaintiff; for it could not be contended that he was bound to guarantee the payment of the 350*l*. to the Defendant.

Best Serjt. *contra*, as to the *first* point, observed, that his motion was founded upon the admission of parol evidence to prove the contents of a letter, written by *Norris* to the Defendant for the purpose of informing him of the dishonour of the bill, although no notice had been receivee for the production of the original. [*Mansfield* Ch. J. I do not remember that any such objection was made upon the trial. Neither will the Court set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury.] With respect to the *second* point, he observed, that the argument on the part of the Plaintiff proceeded upon a misapprehension of the agreement. The Plaintiff was to procure not merely a person to *contract*, (for in that there would have been no difficulty), but a person who would *pay* the Defendant the sum of 350*l*. for these premises.

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premises. The words of the agreement, as proved, were these: "If you let the house, and get me 350*l.* for the lease, I will give you 5*l.*" He was not entitled therefore to the 5*l.* unless the Defendant received the fruit of the contract. *Stevens* could not pay the money, and the Defendant, therefore, released him from the agreement.

MANSFIELD Ch. J. I left it to the jury upon the circumstances proved at the trial to presume a notice to the drawer. The evidence of the clerk was very material. It appeared that a payment had been made on account of the bill; and, in the conversation between the Defendant and *Norris*, no objection was made to the want of notice. As to the other part of the case, I think no doubt can be entertained. The Plaintiff procured a person who offered to take the house upon the stipulated terms. The Defendant made no objection; he accepted *Stevens*, entered into an agreement with him, and received 50*l.* as a deposit. A compromise afterwards takes place. The Defendant does not renounce the agreement, but retains the 50*l.*, and dispenses with the further performance of it. This, upon every principle of fair construction, must be considered as a fulfilment of the contract on the part of the Plaintiff.

HEATH J. was of the same opinion.

ROOKE J. It is not necessary, in order to entitle the Plaintiff to recover, that he should have put the Defendant in possession of the 350*l.* It is sufficient if there has been a substantial performance of the contract. The Plaintiff procured a tenant whom the Defendant accepted, with whom he entered into an agreement for these premises, and under that agreement received 50*l.* as a deposit. It is true that he did not afterwards insist

on

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on the full performance of this engagement, but he retained the money which had been paid, and thereby affirmed the contract.

CHAMBRE J. The Defendant, if he had thought proper, might have rejected *Stevens*. He did not do so; and the Plaintiff must therefore be considered as having fulfilled his part of the agreement.

Rule discharged.

Nov. 12.

BRENNAN and ANNE his Wife v. REDMOND.

If, in an action of assault and battery, the Defendant justify the assault and plead not guilty to the battery, and, at the trial, a verdict be found in his favour upon the justification, and for the Plaintiff, with a farthing damages, upon the issue of not guilty, the Plaintiff, unless the Judge certify, will not be entitled to more costs than damages.

THIS was an action for an assault and battery, committed upon the wife of the Plaintiff *Brennan*. The Defendant pleaded a justification as to the assault, and not guilty to the rest of the charge. Replication *de injuriâ suâ propriâ*, &c. to the justification, and to the plea of not guilty a *similiter*. At the trial a verdict was found for the Defendant upon the justification, and for the Plaintiffs, with a farthing damages, upon the issue of not guilty.

The Judge did not certify; but the Plaintiffs signed judgment, and sued out execution for the damages and 63*l.* 5*s.* costs.

Best Serjt., on a former day, obtained a rule *nisi* to set aside the writ of execution, and for the return of the sum of 63*l.* 5*s.* which had been levied upon the Defendant; and he referred to the case of *Page* v. *Creed*, 3 *Term Rep.* 391.

Cockell and *Lens* Serjts. upon shewing cause observed, that there was one circumstance which distinguished the case of *Page* v. *Creed* from the present. The jury, in that

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BRENNAN v. REDMOND.

that instance, had found a verdict in favour of the Plaintiff upon the justification; and, as there was a general plea of not guilty to the whole declaration, he was placed precisely in the same situation as if no justification had been put upon the record. But here, the justification has been found for the defendant: the effect of this is, that the assault, which is the only part of the trespass that has been justified, is to be considered as taken out of the declaration. The battery, therefore, has been put in issue by itself, and expressly found by the jury.

Best. Serjt. *contrà*, was stopped by

The Court. If there had been no justification, and the jury had by their verdict declared the Defendant guilty of the whole charge, it is clear that the Plaintiffs would not have had a right to full costs, unless the Judge had certified. How then can it be contended, that they are entitled to be placed in a better situation, because the jury have found that the Defendant was justified as to a part of the trespass imputed to him in this declaration?

Rule absolute.

BIGG, Administrator, v. DICK.

Nov. 16.

The want of a description of bail is cured by the Plaintiff's excepting to them.

NOTICE was given to the Plaintiff of justification "of *J. Dick* and *S. Anness*, the bail already put in "for the Defendant, *and of whom the Plaintiff had "before had* notice." No notice of bail had been before given.

Clayton Serjt. opposed the bail, on the ground that neither of them was described in such notice of justifi-

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cation as of any place or business, and that no other description had ever been given before. The Court held that an exception having been entered, the Plaintiff must have had notice of the place of abode of the bail, when he entered the exception in the filazer's book.

Bayley Serjt. for the Defendant (*a*.)

(*a*.) PIERSON *v.* WILLIMENT, 1 *Feb.* 1806.

No notice of bail. Notice of justifying "the bail of whom you "have had notice," not describing them, held by the Court to be good notice. The Plaintiff when he entered his exception in the filazer's book, must see where the bail lived, and could enquire after them.

Best Serjt. for the Plaintiff.

Cockell Serjt. for the Defendant.

TULLOCK *v.* CROWLEY.

Nov. 17.

Security for costs is not required of an *English* subject though abroad.

BEST Serjt. moved that the Plaintiff might give security for the costs, being an *Englishman*, but a prisoner in *France*: but the Court refused to grant the rule (*a*.)

(*a*.) The practice appears to be contrary in the King's Bench. See *Perry* v. *Eden*, 1 *Term Rep.* 267. *Fitzgerald* v. *Whitmore*, 1 *Term Rep.* 362. *Walters* v. *Frythall*, 3 *East*, 538.

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Nov. 19.

NAYLOR and Another, Executors of SAMUEL NAYLOR, *v.* COLLINGE.

A covenant, by a tenant, to yield up in repair at the expiration of his lease, all buildings which should be erected during the term, upon the demised premises, includes buildings erected by the tenant, for the purpose of trade and manufacture, if such buildings be let into the soil or otherwise fixed to the freehold, but not where they merely rest upon blocks or pattens.

A RULE *nisi* was obtained in *Trinity* term, for an attachment against the Defendant for the non-performance of an award. The Plaintiffs had brought an action for a breach of covenant committed by the Defendant, in not keeping, and delivering up at the expiration of his lease, in a proper state of repair, certain premises of which he was tenant. Upon the trial of the cause an order was made, referring all matters in difference between the parties to arbitration.

The lessee had covenanted, "that he should and would, from time to time and at all times during the continuance of the said lease, at his own proper costs and charges, well and sufficiently repair, uphold, and support, maintain, amend, and keep the said messuage or tenement and premises, and all erections and buildings, then already erected and built, as also all other erections or buildings that might, thereafter, be erected and built, in or upon the said premises or any part thereof, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as need or occasion should be or require, and the same premises, in such good and sufficient repair, should and would, at the end, or other sooner determination of the said lease, peaceably and quietly surrender and yield up," &c.

The arbitrator awarded, among other things, as follows: that the Defendants should pay to the Plaintiff the sum of 90*l.*, for and on account of the breach of the said covenant, so far as the same respects the repairing and yielding up in repair certain erections and buildings, *which, during the term granted by the said lease,*

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were erected and built on the said demised premises by the said John Collinge, *as tenant and occupier thereof, and let into and fixed to the soil and freehold thereof, and which were built and used for the purpose of trade and manufacture only, and were removed and carried away by the said* John Collinge, *by whom the same were built*; and the further sum of 60*l.* for and on account of the breach of the said covenant, so far as the same respects the repairing and yielding up in repair certain other erections and buildings, *which, during the term granted by the said lease, were erected and built on the said demised premises by the said* John Collinge, *as tenant and occupier thereof, for the purpose of trade and manufacture only, and used for that purpose only, but which were not let into the ground soil or freehold of the said premises, but were built and supported on blocks or pattens of wood laid upon the ground*, and were, in like manner, removed and carried away by the said *John Collinge*, by whom the same were built." Neither of these sums had been paid, and the award was drawn in the above form, in order to give the parties an opportunity of obtaining the judgment of the Court upon the question, whether the different kinds of buildings which it described, or either of them, were comprehended within the terms of the covenant.

Shepherd and *Bayley* Serjts. upon shewing cause, observed, that there were two questions submitted upon this award to the decision of the Court. Whether the Defendant was entitled to remove, 1st, those buildings which, during the term, were erected by the tenant for the purposes of *trade*, and were *let into the soil?* And, 2dly, Those which were erected for the same purposes, and which were *not let into the soil, but rested on blocks or pattens of wood.* It had long since been determined that the tenant was entitled to remove such buildings as he had

had erected, during his term, for the purposes of trade. It was not the intention of the parties, in the present instance, to restrain the operation of this general rule. The object of the covenant was merely to provide that those buildings, which the tenant was bound by law to leave on the premises, should be left in a proper state of repair.

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NAYLOR v. COLLINGE.

The Court interposing observed, that the parties were precluded from all general argument by the express words of the covenant. The question must be confined to the construction of this agreement. What then is its plain and obvious import? The words are, "all erections and buildings." The Defendant, therefore, in order to succeed upon this part of his case, must prove that erections and buildings raised for the purposes of trade, are in fact not erections and buildings. If the tenant meant to exclude buildings of this nature, it should have been so expressed. The Court cannot go out of the covenant. The other point is equally clear in favour of the Defendant. The thing removed is described as not let into the soil, but as resting upon blocks or pattens. It is therefore a mere chattel, and is not an erection or building within the meaning of the covenant.

Best Serjt. who was to have argued on the other side, deferred upon the latter point to the opinion of the Court, and it was ordered that upon the payment of the first sum of 90*l*. the

Rule should be discharged.

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Nov. 19.

Hutchinson v. Best.

If a declaration be filed on the *essoin* day, with the usual notice indorsed the Defendant must plead in eight days from that time; although, by the rules of the office, no person is allowed to search for a declaration till the first day in full term.

THE Plaintiff in this cause having signed judgment for want of a plea, a rule *nisi* was obtained on a former day for setting it aside, on the ground that it had been signed before the time for pleading had expired.

Vaughan Serjt. upon shewing cause stated, that the Defendant was arrested and held to bail upon a writ of *capias ad respondendum* returnable on the morrow of *All Souls*. On the third of *November*, the *essoin* day of the term, a declaration was filed, *de bene esse*, with the usual notice indorsed, to plead in eight days. Interlocutory judgment was signed on the afternoon of the eleventh, which was the eighth day from the time of filing the declaration. He submitted, therefore, that the proceedings were strictly regular.

Best Serjt. *contrà*. It is true that the declaration was filed on the *essoin* day; but the Defendant was not served with notice; and as, by the regulations of the office, no person is permitted to search for a declaration before the first day of term, he had no means of ascertaining till that time that a declaration had been filed. Neither could the Defendant, when he took the declaration out of the office, know on what day it had been filed; for no memorandum of the day is made in the office, nor was it indorsed on the declaration. The Defendant therefore naturally referred it to the 6th, and conceived that the time for pleading would not expire till the 14th. If the eight days are to be computed from the *essoin* day, the time for pleading will, in cases similar to the present,

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HUTCHINSON v. BEST.

present, be in effect reduced from eight days to five, contrary to the general rule of the Court.

The Court, after consulting with the officers, observed, that when the declaration was filed on the *essoin* day, the Defendant was bound to plead in eight days from that time. This was the settled practice, and the consequence of it undoubtedly was, that, in these cases, the time for pleading would be abridged, since the Defendant could not search the book to discover whether a declaration had been filed, till the first day of the term. But he might afterwards take out a summons to enlarge the time, and thus, if there were any inconvenience in the rule, it might easily be obviated. It appeared then that there was no irregularity in signing the judgment, and the rule must therefore be discharged.

Best afterwards observed that the Defendant had sworn to merits; and the Court therefore permitted the judgment to be set aside upon payment of all the costs.

AUSTEN and Others, Assignees of the Sheriff of MIDDLESEX, v. FENTON.

Nov. 20.

In an action on a bail bond, if the issue depends on the date of the appearance, the Court, upon an application by the Plaintiff, will order the *day* of the appearance to be entered in the filazer's book.

Although, before the application to the Court, issue has been already joined on the plea of *comperuit ad diem*.

THE Plaintiffs had sued out a writ of *capias ad respondendum* in an action against *Berger* and *Parker*, upon which the former only was arrested. The sheriff returned *non est inventus* as to *Parker*. *Berger*, upon his

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arrest, gave bail to the sheriff, but not having put in bail above in due time, an assignment of the bond was taken on the 30th of *May*. Upon the same day bail was put in for *Berger*, notice of which was left, two days afterwards, at the house of the attorney for the Plaintiffs. On the sixth of *June* an action was commenced upon the bail-bond against *Fenton*, *Berger's* bail. The Defendant filed a plea of *comperuit ad diem*, and ruled the Plaintiffs to reply. The Plaintiffs replied *nul tiel record*, and were afterwards ruled to enter the issue.

Shepherd Serjt. on a former day obtained a rule calling on the Defendant to shew cause, why the appearance of *Thomas Berger* should not be recorded according to the fact, as to the time of his appearance. He stated that bail above was put in for *Berger* on the 30th of *May*, but, as it was entered generally of the term in the filazer's book, it would of course relate to the first day, and upon the production of that book at the trial, the Plaintiff, on the issue of *nul tiel record*, would be nonsuited. He was compelled to reply *nul tiel record* in order to prevent a judgment of *non-pros*, the rule to reply having been given after *Trinity* term.

Bayley Serjt. upon shewing cause, observed, that this was a new application. He had not been able to find any instance of a similar motion. And there was nothing in the circumstances of this case that could induce the Court to interfere in favour of the Plaintiffs. The only object of the proceedings upon the bail-bond was to put costs into the pocket of the attorney. No step could be taken in the original action till *Parker* had appeared, and it was wholly immaterial at what time special bail was put in by *Berger*, provided it was done before the appearance of *Parker*. The action upon the bail-bond was not commenced till after bail was actually put

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put in and notice served on the Plaintiff's attorney. It was true that the bond was assigned on the same day upon which the bail was entered; but the assignment might be made at any time; it was not considered as a step in the action. At all events, he observed, the application in this case came too late, as the Plaintiffs had already replied *nul tiel record.*

Shepherd Serjt. *contrà.* The Plaintiffs were ruled to reply in the vacation, and they were therefore compelled to deliver a replication in order to prevent judgment of *non-pros* from being signed. He stated that the object of the action upon the bail-bond, which had been delayed at the request of *Berger*, was to compel the parties to apply to the Court. In that case the Defendant would have been required, as the condition for obtaining a stay of the proceedings, to put in bail for *Parker.*

The Court. The entry of bail relates generally to the term, the effect of which must be, that the action, though properly commenced, will be defeated. There can be no reason why, for the purpose of obviating this consequence, the entry should not be made according to the truth of the fact.

Rule absolute.

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The KING *v.* ANTONIO DEPARDO.

Nov. 21.

A manslaughter committed in *China*, by an alien enemy, who had been a prisoner of war, and was then acting as a mariner on board an *English* merchant ship, on an *Englishman*, cannot be tried here under a commission issued in pursuance of the statutes 33 *Hen.* 8. *c.* 23. and 43 *Geo.* 3. *c.* 113. *s.* 6.

THE prisoner was tried and convicted at the *Old Bailey* on the 30th of *October* 1807, before Lord *Ellenborough* C. J. and *Thompson* B., under a special commission issued by virtue of the statutes 33 *Hen.* 8. *c.* 23. and 43 *Geo.* 3. *c.* 113. *s.* 6., upon an indictment for "feloniously killing and slaying *Wm. Burne* at *Canton* in *China*, in parts beyond the seas without *England*."

At the trial it was proved that the deceased was an *Englishman*, and a mariner belonging to the *Alnwick Castle*, a ship in the service of the *East India* Company, having letters of marque. That the prisoner *Depardo* was a *Spaniard*, and had been a prisoner of war on board his Majesty's ship the *Blenheim*; that two or three months before he committed the offence, he entered as a volunteer on board the *Alnwick Castle*, at *Pulopenang* or *Prince of Wales's Island*, which is under the dominion of his Majesty, and received the usual bounty; and also that on the day before the perpetration of the act, he received some part of his pay: that at the time of committing the offence, he was one of the crew of the *Alnwick Castle*, which was then lying near *Canton*, in a part of the *Canton* river, about one-third of a mile in width, within the tideway, at the distance of about 80 miles from the sea; that the prisoner went on shore with others of the crew, and there mortally wounded the deceased, who was afterwards carried on board the ship, where he died on the following day.

Doubts being entertained whether the prisoner was an object of the special commission issued under the statutes before mentioned, the Court was pleased to order the case to be stated for the opinion of the twelve Judges.

Burrough,

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Burrough, for the Prisoner, admitted, that though the whole tenor of the stat. 33 *Hen.* 8. c. 23., which gives the commissioners a jurisdiction in the cases therein mentioned, seems clearly to point at offences committed within the king's dominions, it was now too late to contend that it applies exclusively to such; for, on account of the words "*or without,*" which are found near the end of the first section, the act has been held by Lord *Holt* and others to extend to offences committed out of the king's dominions. By the stat. 43 *Geo.* 3. c. 113. the same law is extended to accessaries, and to manslaughter. The question to be decided, in substance is, whether an alien enemy, having done nothing to divest himself of that character, committing an offence in a country not within the king's dominions, is amenable to the laws of *England*. An alien is not in general subject to the laws of another country: by a medium indeed he may become subject to them, if he places himself within the range of those laws. Adherence to the king's enemies is treason: and by the express provisions of the statute 35 *Hen.* 8. c. 2. treasons committed either within or without the realm may be tried here, 1 *Hale P. C.* 169. But if an alien adhere to the king's enemies without the realm, that is no treason, unless he hath been previously domiciled here, in which case it has been decided that his adherence is treason. A subject of *Spain* cannot divest himself of allegiance to the *Spanish* king. *Nemo potest exuere patriam.* And two or more co-ordinate absolute allegiances cannot be due from one person to several independent princes, 1 *Hale P. C.* 68. The prisoner cannot discharge himself of his natural allegiance by swearing allegiance to a new prince. His very act of becoming a volunteer on board our ship was high treason to the King of *Spain*, an adherence to his enemies. The prisoner might, though abroad, have become subject to the laws of this country in three

ways;

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ways; by naturalization, by becoming a denizen, or by taking the oath of allegiance; but he could not, by entering on board this ship, by making a contract, not with the sovereign power, but with a company of private merchants, become amenable to our laws. If he had been on board a king's ship, in the pay of the crown, perhaps it might have been otherwise. All the obligations an alien incurs, are local and transitory. The prisoner, it is true, while on board the *Blenheim*, was under the protection of the King of *Great Britain*. But he was not domiciled at *Pulopenang*, where he became a volunteer; he was a prisoner of war; he was on board a ship there by compulsion, not by choice; and when he went away he had no *animus revertendi*. He thence goes into the dominions of the Emperor of *China*, and commits a crime there, for which he might have been punished by the laws of that empire; but his offence had no inception in the country in which his local allegiance for a time had been due to the King of *Great Britain*. If a foreigner come and live here, and then quit the realm entirely, and commit a crime abroad, this country has no jurisdiction to try him. It is impossible that a foreigner living in a country where our laws do not attach, should be amenable to our laws. The prisoner is in the same situation as if he had originally entered into the service at *Canton*. His contract with the merchants was void (*a*.)

Heath J. The Court of Common Pleas were divided in opinion (*b*,) whether a prisoner of war could recover his wages on a contract to work his way home.

(*a*) Sed vide *Sparenberg* v. *Bannantyne*, 1 *Bos. & Pull.* 163.

(*b*) In a case of *Maria* v. *Hall*, see note, *post*.

Grose

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GROSE J. It was not contended in that case that the contract was void; but it was doubted whether the Plaintiff could enforce it during the war.

HEATH J. It was considered that the king might recover on that contract.

MANSFIELD C. J. And if he did not, the prisoner might enforce it after the conclusion of a peace.

No protection was afforded to the prisoner by the laws of this country, which might impose on him the reciprocal obligation of allegiance. Neither of the cases that will be cited of foreigners tried by virtue of 28 *Hen.* 8. *c.* 15. establishes that the prisoner's offence comes within this jurisdiction. In none of these cases had the persons indicted the benefit of counsel, and they passed *sub silentio*. The Admiralty Court proceeds on principles different from those of the common law. The stat. 28 *Hen.* 8. *c.* 15. merely altered the mode of trial in that court, and its jurisdiction still continues to rest on the same foundations as it did before that act; it is regulated by the civil law, *et per consuetudines marinas*, grounded on the law of nations, which may possibly give to that Court a jurisdiction that our common law has not (*a*.) The *English* law looks only at the place where, and the person by whom, the crime is committed; and the prisoner cannot be tried here without an extension of the known law.

Abbott for the prosecution. The deceased was a *British* subject; and *Depardo*, a subject of a state hostile to his majesty, was made a prisoner of war, and while he resided in a settlement within his majesty's dominions,

(*a*) Vide 3 *Inst*. 112.

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he received a great benefit in the permission given him to assume the character of a mariner on board an *English* merchant ship: whilst invested with that character, he commits this crime. His contract with the merchants was valid; he had received his bounty on entering, and part of his wages; he was under the protection of the laws of *England*, and consequently was bound to obey them. This is not the question of two co-ordinate absolute allegiances. All writers admit that though a subject cannot shake off his native allegiance, he may owe a second allegiance of a local and temporary nature. It is admitted, that if the prisoner had committed this crime in the *Thames*, he might have been tried for it here. He is equally amenable, though he has committed it at *Canton*. It is clear that the laws of every state bind those who are under the protection of them. It is admitted this statute extends to cases out of the king's dominions. The two first cases that were tried under this statute were those of *Chambers*, an *English* sailor, for the murder of an *English* sailor at *Barcelona* in *Spain*; and of *Ealing*, an *Englishman*, for the murder of an *Englishman*, at *Dollars* in *Sweden*. It is laid down by Lord *Coke*, that the constable and earl marshal shall try the murder of an *Englishman* committed by an *Englishman* in parts beyond the sea, 3 *Inst.* 48. The appeal of murder of one *Englishman* by another shall be tried by the constable and marshal, *Staundf.* 65. Thus it appears, that previously to the stat. 28 *Hen.* 8. there existed an authority to try the crimes of subjects committed on subjects out of the realm, though it was disused before the period at which that act was passed, 1 *Hale P. C.* 355. *Attainder*. The stat. 33 *Hen.* 8. c. 23. was not introductory of a new law, it only introduced a better mode of trying according to the old law, and of carrying its principle into effect, a principle consonant to the laws of all nations, that subjects, wherever they may

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be, are amenable to the laws of their own country. The prisoner was, at the time of committing this offence, a subject of *Great Britain*. One who receives the protection of the laws, is subject to the laws. The whole of the treatment he received, and the engagements he was permitted to enter into, at *Pulopenang*, were benefits, conferred on him by the laws. Prisoners of war were originally put to death; then condemned to perpetual slavery; to this succeeded the system of ransoming; and the practice now is to exchange them. *Bynkershoek Quest. Jur. Pub. lib.* 1. *c.* 1. But after an enemy is become a prisoner, all that he receives, is grace and favour; his life itself is prolonged by grace and favour; it is grace and favour that he shall be tried by the municipal laws of the country where he is a prisoner, instead of martial law, which is more severe. He is not then less amenable, because he happens to be out of the realm, if he continues, as the prisoner did, under the protection of the laws; for it will not be argued, that if an *Englishman* had taken the life of the prisoner, he could not have been tried by this commission. Every case decided under the statute 28 *Hen.* 8. *c.* 15. is an authority for a like decision under this act. It is not necessary to inquire what authority the Admiralty Courts had before the passing of 28 *Hen.* 8. *c.* 15., because the commission under which they now sit only authorizes them to try the offences named in that statute. That commission would not enable them to try an alien for the murder of an alien committed in a foreign ship. It extends only to native subjects, or such as receive the protection of the laws of this country; and as that statute enables the commissioners to try offences committed on the high seas, so does the statute of 33 *H.* 8. *c.* 23. give power to try offences committed any where without the realm by those who are in the king's allegiance.

There

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There are three recent cases of the trials of foreigners for similar offences under 28 *Hen.* 8. The first in order of time is that of *François Antoine Sauvajot*; a *French* prisoner of war, who was indicted for the murder of *Mosteau*, another *French* prisoner of war, on board the *Triton East Indiaman*, upon the high seas, at the entrance of the *English* Channel, in *September* 1799. He was convicted of manslaughter, and burnt in the hand. This was a short time after the act 39 *Geo.* 3. *c.* 37. *s.* 1. received the royal assent (*a*.) The second case is that of *Jean Prevôt*, a *Frenchman*, who had entered at *Falmouth* as a mariner on board the *Lady Shore* transport: he was indicted at the *Old Bailey* in *December* 1799, for "that on the high seas, within the jurisdiction of the Admiralty of *England*, with force and arms he assaulted and murdered *Wilcox*," the master of the *Lady Shore*, a transport. The offence was committed in *August* 1797, off *Cape Trion* in *Africa*, on the passage to *New South Wales*. He was convicted and executed. It is not known whether he was a prisoner of war or not. The third case is that of *Acow*, a *Chinese* mariner, who was tried for a murder committed in *May* 1806, on another *Chinese* mariner, on board the *Travers East Indiaman*, on the high seas, about 20 leagues from the *Azores*, in the course of the homeward voyage, from which circumstances it appears that the prisoner must have entered on board that ship abroad. It is true that none of these persons had the benefit of counsel upon their trials, but they had the benefit of that humanity and discretion which suggested the propriety of the present argument. The statute of 33 *Hen.* 8. must therefore be construed in the same manner as that of 28 *Hen.* 8. And the jurisdiction given by the former, must be deemed to extend to all of-

(*a*) That was on 10th *May*, 1799.

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fences committed ashore in foreign countries, as the latter has been held to comprehend those committed on the sea (a.)

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(a) No judgment was ever given in this case, but the prisoner was afterwards discharged.

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ASSUMPSIT. The first count of the declaration was for labour care and diligence, by the Plaintiff done performed and bestowed in and about the business of the Defendant, at his special instance and request. The 2d was a *quantum meruit* thereon: to these were added the common money counts. The Defendant pleaded, that the said *Joseph* (the Plaintiff) is an alien enemy, born in foreign parts, to wit, in *Spain*, out of the allegiance of our lord the King, and within the allegiance of a foreign king, to wit, of the King of *Spain*, to wit, at *London* aforesaid, in the parish and ward aforesaid, and that the said *Joseph* came into this kingdom without letters of safe-conduct, and that the said *Joseph*, before and at the time of the commencement of this suit, was and still is a prisoner of war in this kingdom, to wit, at *London*, &c. and that before and at the time of the commencement of the said suit, the king of *Spain* and his subjects were, and still are, at open war with, and the enemies of, our said lord the King and his subjects, to wit, at *London*, &c. The Plaintiff replied, As to the said plea, as far as the same relates to the 1st and 2nd counts of the declaration, (with a protestation against the insufficiency of the plea,) That he the said *Joseph*, before the time of the doing, performing, and bestowing the work and labour, care, and diligence in the said declaration mentioned, to wit, on the 1st day of *January*, &c. in parts beyond the seas, to wit, at *London*, &c. was made a prisoner of war by certain forces of his present majesty king *George* the Third, and before and at the time of the doing performing and bestowing the said work and labour, care and diligence, was, by and with the consent of the commanding officer of the said forces, put under the care and custody of the said *George*, to be by him carried and conveyed, as such prisoner of war, into this kingdom, to wit, at *London*, &c. and thereupon, whilst the said *Joseph* was so under the care and custody of the said *George*, and before the doing performing or bestowing of the said work and labour, care and diligence,

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ligence, to wit, on the day and year last aforesaid, at *London*, &c. the said *George* retained the said *Joseph* for certain hire and reward to be therefore paid to the said *Joseph*, to do, perform, and bestow the said work and labour, care and diligence, in the said declaration mentioned. And the said *Joseph* thereupon, whilst he was so under the care and custody of the said *George*, to wit, on the day and year last aforesaid, and on divers other days between that day and the commencement of this suit, did perform and bestow the said work and labour, care and diligence, on the said retainer of the said *George*, and at his special instance and request, to wit, at *London*, &c. And as to the said plea, so far as the same relates to the other counts of the declaration, That he the said *Joseph*, before the commencement of this suit, to wit, on the 1st day of *January*, &c. to wit, at *London*, &c. came into this kingdom under the protection of His present Majesty King *George* the third, and remained and continued in this kingdom under the protection of his said majesty from thence continually until the commencement of this suit, to wit, at *London*, &c. To this there was a rejoinder, demurring generally to so much of the replication as relates to the 1st and 2d counts of the declaration, and tendering issue as to so much as relates to the other counts. The sur-rejoinder joined in demurrer and issue.

The case was twice argued; first by *Shepherd* Serjt. in support of the demurrer, and *Bayley* Serjt. *contra*; and again in a subsequent term, by *Lens* Serjt. in support of the demurrer, and *Best* Serjt. *contra*.

Argument in support of the demurrer.—The question is, whether, under the circumstances stated upon this record, the Plaintiff is entitled to maintain an action in a court of common law. The general principle that an alien enemy cannot maintain an action, has been so fully recognized in the cases of *Brandon* v. *Nesbitt*, 6 *Term Rep*. 23. and *Bristow* v. *Towers*, 6 *Term Rep*. 36. that unless some ground of distinction can be established between the case of a common alien enemy, and that of the Plaintiff on this record, the demurrer must prevail. It will be urged, perhaps, that the Plaintiff is a prisoner at war. But a prisoner at war, so far from losing the character of alien enemy, rather stands in a more odious light than an alien enemy who has not been made prisoner; since the very character of a prisoner at war, implies that the person has actually committed hostilities upon this country. The only decision which can be supposed to operate in the Plaintiff's favour, is that of *Sparenburg* v. *Bannantyne*, 1 *Bos. & Pull*. 163.: but although some intimations were thrown out by the Court in that case, which

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seem to support the present Plaintiff's right of action, yet the ultimate determination of that case will be found to establish nothing more, than that a prisoner at war, not an alien enemy born, but who has acquired a temporary character of alien enemy from the act of hostility in which he was taken, may maintain an action. There does not seem to be any necessity for establishing a difference between the case of a prisoner at war, and that of any other person being an alien enemy, in respect of the right to sue; since it is the uniform practice of nations at this day, that all those who are in the unfortunate situation of prisoners at war, are either maintained by the state in which they reside, or by the state to which they belong. And though indeed a prisoner at war upon his parole, is not so maintained, yet in case of his feeling any difficulty arising from his own peculiar situation, he always has his option to surrender himself to prison, in order to receive the same benefits which are extended to other prisoners at war. In the case of the three *Spanish* sailors, 2 *Bl.* 1324. this Court refused to grant a writ of *habeas corpus* to bring up three prisoners at war on account of ill treatment, considering them as not entitled to any of the privileges of *Englishmen*. Now the writ of *habeas corpus* is only a summary mode of obtaining the same remedy which might otherwise be had by an action of trespass; and if a prisoner at war cannot maintain trespass, there is no reason why he should maintain any other action. It is true indeed that an indictment will lie for beating or otherwise ill-treating a prisoner at war; but the reason of that is, that such acts are against the king's peace, for the breach of which the king may sue: but the moment a man becomes alien enemy, he himself forfeits all right to claim the benefit of the laws by suing in any of the king's courts. *Dyer*, fo. 2. *b.* *Co. Litt.* 129. *b.* With regard to the implied protection which an alien enemy may be supposed to enjoy from the state during his residence in this country, all argument on this head seems to be done away by the express provision introduced into *Magna Charta*, c. 30. 2 *Inst.* 57. in favour of merchant strangers, the latter part of which declares, that merchants, natives of an hostile state, being found in this country, shall be attached by their bodies until it be ascertained in what manner the *English* merchants are treated in the hostile state; from which it may be inferred, that all natives of an hostile state, except merchants, being found in this country, may be treated as enemies.

Arguments for the Plaintiff. *Primâ facie* every person resident in this country is entitled to maintain an action. Unless, therefore, some authority can

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be shewn for excluding a person in the Plaintiff's situation from exercising that right, the demurrer must be overruled. The plea of alien enemy has always been deemed an odious plea; the Court therefore will not willingly extend its operation. The principle on which that plea was introduced into our law, was to prevent the subjects of the enemy from drawing property out of this country to strengthen the state with which we were engaged in war: it is obvious that such a principle cannot apply to the case of a prisoner at war, who being a person commorant in this country, may be prevented from carrying out of it any property that he may acquire during his residence here. It has been said that the character of prisoner at war implies, that the person who bears that character has committed actual hostilities; but that consequence does not necessarily follow, since many seamen are taken prisoners on board merchant vessels, without having been engaged in any act of hostility whatever. In all the cases which have occurred, where the plea of alien enemy has been supported, it has appeared that the persons suing still continued in actual hostility; but the moment that an enemy has accepted the conditions which are extended to prisoners at war, his hostility ceases: he receives protection from the state by which he is captured, and in consequence of that protection, he owes obedience to that state. If a prisoner at war is murdered, the guilty person may be indicted: this was not attempted to be controverted in the late case of *The King* v. *Innes*. An alien enemy, as such, cannot be indicted for treason, *Calvin's* case, 7 *Co.* 6. *b.* *The King*, v. *Tucker*, 1 *Ld. Ray.* 1.; but if an alien enemy be taken under the king's protection, he may be indicted, as was done in the case of the two *Portuguese*, cited in *Calvin's* case. In *Wills* v. *Williams*, 1 *Ld. Ray.* 282. 1 *Salk.* 46. S. C., the distinction between an alien enemy commorant here, or commorant in his own country, is expressly taken: for *Treby* C. J. says, An alien enemy who is here in protection, may sue on his bond or contract; but an alien enemy, abiding in his own country, cannot sue here. It also appears from that case, that the protection necessary to give a right to sue, is not confined to letters of safe-conduct; the terms used in that case being, "*Per licentiam et sub protectione regis.*" Now residence in the country, and particularly that of a prisoner at war, implies licence of the king.

ROOKE J. According to the report of that case, 1 *Lutw.* 35. it was said, "If he came "here in time of war, and had "continued here without dis"turbance, it should be intend"ed that he came with a li"cence."

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The same doctrine is recognized by Mr. Justice *Heath*, in *Spurenburgh* v. *Bannatyne*, who says, "There may be a protection arising from situation." And indeed the principle laid down in that case seems to go the whole length of supporting the present Plaintiff's right of action.

Cur. adv. vult.

It was understood that no judgment was ever given in this case, nor was it mentioned again, until it was alluded to in the above case of *Depardo*.

Ex parte ABNEY.

Nov. 21.

The Court will not interfere to authenticate a fine levied by a married woman in the absence of her husband, though he has become a bankrupt, and omitted to surrender himself, and is gone beyond seas.

VAUGHAN Serjt. moved that *Elizabeth Abney*, a feme covert, might be permitted to pass a fine as a feme sole, upon affidavits which stated the following facts: She being possessed of a considerable landed property for her life, her husband, in consideration thereof, by his marriage-settlement appointed to her a rent-charge of 500*l*. *per ann*. out of certain lands, for her life in case she should survive him. On the 19th of *July* 1805 he became a bankrupt: a commission issued, to which he did not appear, but absented himself from home, and went beyond seas; it was believed he was living and was in *America*, but it was not certainly known whether he was living or dead. The wife was desirous to sell to the assignees, who had possessed themselves of all the lands, her reversionary interest expectant on her husband's decease, as well in her own estate, as in the rent-charge.

Vaughan thought that the circumstances of this case might make it an exception to the rule laid down in *Stead*, v. *Izard*, 1 *New Rep*. 312. *Compton* v. *Collinson*, 1 *H. Bl*. 344. *Moreau*'s case, 2 *Bl*. 1205., and other cases in which the Court had said, "We will not interfere: *valeat quantum*." If the husband chooses to en-

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ter, and avoid it, he may. If he does not, it will bar her heirs.

MANSFIELD C. J. No doubt a fine levied by a married woman will bar her heirs, if her husband does not enter. But the difficulty is, how the Court can permit her to levy a fine, when the husband may enter and bar it. There was a very strong case, in which the husband was a fugitive and bankrupt, and the wife had contracted for the sale of her separate estate. But we refused the writ upon that application. We can here make no order to sanction, or add validity to the fine. If you mention that she is a married woman, it is bad on the face of it. Act as you shall be advised, but the Court has nothing to do in the matter.

Rule refused.

ALGER v. HEFFORD.

Nov. 22.

Where an order is obtained for taxing an attorney's bill, and delivering up all papers, *&c.*, upon the back of which the prothonotary, according to the usual practice, indorses his *allocatur*, the attorney is entitled, in the first instance, to the possession of it, for the purpose of enforcing payment of his bill.

THE Defendant, upon substituting *Smith* to be his attorney in lieu of *Sherwood*, obtained an order that *Sherwood's* bill of costs should be taxed, and that he should deliver up all books, papers, &c. This order, with the prothonotary's allocatur indorsed thereon, according to the usual practice, was taken from the office by *Smith*, who sent a copy of it to *Sherwood*.

A rule was obtained on a former day, calling upon *Smith* to shew cause, why he should not deliver the original order to *Sherwood*, and why he should not pay the costs of the application.

Marshall

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Marshall Serjt. upon shewing cause against the rule, stated, that the party obtaining an order was always considered entitled to the possession of it, and that *Sherwood* might get the *allocatur* indorsed upon the copy. If the original order were given to him, the Defendant would have no means of enforcing the delivery of the papers.

Vaughan Serjt. *contrà*, observed, that the payment of the money was the first thing to be done under this order; that, to enforce the payment, the order must be made a rule of Court; and that *Sherwood* therefore was entitled to the possession of it for that purpose.

The Court, after consulting the officers, observed that the party to whom the money was to be paid was certainly entitled to the possession of the original order, that he might enforce the payment by making it a rule of Court, which the other party might not be willing to do. Accordingly

The Rule was made absolute.

(IN THE EXCHEQUER-CHAMBER.)

MOORE Gent. *v.* MEAGHER. In Error.

Nov. 23.

If in consequence of words spoken the Plaintiff is deprived of substantial benefit arising from the hospitality of friends, this is a sufficient temporal damage whereon to maintain an action.

THIS was a writ of error from a judgment of the Court of King's Bench in an action on the case for defamation. The Plaintiff below in her declaration alleged, that she had always been a virtuous, modest, and chaste subject, and until, &c. had always been esteemed to be of unblemished reputation, and that before, and at the time of the slander she *enjoyed the society, conversation, friendship, and countenance of many worthy and estimable subjects* of this realm, (naming them,) and lived and

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and associated with them on terms of mutual respect, confidence, and intimacy, *and was by divers of those persons,* (naming them,) *received and entertained in their respective houses, and found and provided by them respectively with meat and drink, gratuitously,* and without any price or sum of money whatsoever by her paid or payable for the same, *to the great reduction of her necessary expences* of living and maintaining herself, *and the great increase of her riches,* to wit, at *Westminster,* and that the Defendant, well knowing the premises, and envying the happiness of the Plaintiff, and maliciously contriving and intending to injure and ruin her in her character, and to deprive her of the good-will, society, conversation, friendship, and commerce of all her friends, relations, and acquaintances, and to impoverish her and deprive her of all the benefits and advantages of her fortune and pecuniary circumstances, so by her received and receivable as aforesaid, spoke the false and defamatory words complained of, (imputing incontinence to the Plaintiff,) by means of speaking of which several false, malicious, and defamatory words the Plaintiff had been and was greatly injured in her credit and reputation, and brought into public scandal, *&c.*, and her friends and neighbours, and especially the several persons herein-before in that behalf named, had wholly *refused to hold or permit any intercourse or society with her, or to receive and admit her into their respective houses or company, or to find or provide for her meat, drink, or any other benefits and advantages in any manner whatsoever, as they before that time had done, and otherwise would have continued to do;* whereby the Plaintiff had lost all those valuable benefits and advantages, being to her theretofore *of great value, to wit, of the value of* 100*l.*, and had been and was greatly reduced and prejudiced in her fortunes and pecuniary circumstances, and *obliged to incur a much greater expence in her necessary living and supporting herself, to a large*

amount,

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amount, to wit, the annual amount of 100*l*., *than she theretofore had done, and otherwise would have continued to do,* and had been and was greatly impoverished, and all her friends had wholly withdrawn their friendship, &c.

A verdict was found for the Plaintiff for 100*l*. damages, and judgment was entered up accordingly.

The errors assigned were, that none of the words alleged in the declaration were in themselves actionable, (which was admitted by the Defendant in error,) and that no substantial or real specific damage, or legal or specific injury, was alleged to have been sustained, in consequence of the words so spoken and published.

Curwood for the Plaintiff in error. Although it was ruled in *Medhurst* v. *Balam*, 1 *Ro. Abr.* 35. *c.* 20. that an action lies for words of incontinence, *per quod perdidit consortium vicinorum suorum*, without an allegation that the Plaintiff thereby lost her marriage, yet the authority of 1 *Sid.* 396, 7. is to the contrary. And in the case of *Barnes* v. *Strudd*, 1 *Lev.* 261. the decision in *Medhurst* v. *Balam* was denied to be law, 1 *Com. Dig.* 253. *acc.* Then the only special damage is the loss of the liberal entertainment the Defendant in error used to receive at the houses of her friends. Now certain things are valuable in fact which are not valuable in the contemplation of law. A prospect is valuable, but no action lies against a man who builds a wall on his own land, though he may thereby obstruct the prospect of his neighbour, 9 *Co.* 48. *Aldred's* case. So the loss of this hospitable reception is not a matter of action. The policy of the law, which supposes every man to live by his own industry, will not suffer that an action should lie in such a case.

HEATH J. It has been held that case would lie for imputing leprosy, *per quod consortium amisit*?

Richardson

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Richardson for the Defendant in error. The declaration has not been sufficiently stated in the Plaintiff's argument. It alleges that the persons named gratuitously received the Defendant in error into their houses, and provided her with meat and drink, to the great reduction of her expences, and increase of her riches. The Defendant below demurred specially, and assigned for cause that this was not a temporal damage; but the Court on argument held, that the question whether this were a temporal damage or not, was a matter of fact, and not a matter of law, and that if the provisions furnished to the Plaintiff by her friends were of the annual value of 100*l*., as the declaration alleged, the loss of them was a real damage, and directed the Defendant to withdraw the demurrer and plead to the action. The jury have found the damages to be 100*l*. And it is now contended, that this cannot be a special damage. The Plaintiff below receives real benefit from the assistance of her friends; the Defendant for malicious purposes speaks these words, by which she loses that assistance. It is admitted, that if the least pecuniary salary were lost, an action would lie: how can it be otherwise upon the loss of that which is equivalent in value to money? *Com. Rep*. 7. *Ld. Ray*. 266. and other authorities shew that as against a wrong doer a possessory title is sufficient. It is urged that these persons were not bound to provide her entertainment: but they did in fact entertain her, and would have continued to entertain her, as the jury have found; whose verdict cannot now be controverted. Words spoken of a tradesman, are actionable, if spoken with reference to his trade: but words spoken of him, though not referring to his trade, are actionable if he thereby loses a customer, 1 *Lev*. 140. Yet no individual customer is bound to frequent any particular shop; but it is sufficient if he would in fact have come, except for the malicious interference of a stranger. The case of *Hartly* v. *Herring*, 8 *Term Rep*. 130. was an action brought by a preacher,

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a preacher, for words imputing incontinence, *per quod*, persons frequenting the chapel discontinued giving him the gains and profits which they had usually given. There the Court held there was no objection to the declaration; and Lord *Kenyon* said it was sufficient if the Plaintiff lost his occasional employment. *Lilly Ent.* 61. *Bracebridge* v. *Watson*. The Plaintiff shewed that she was a single woman and chaste, and that her mother spontaneously meant to give her 150*l.*, and her brother to give her 100*l.*; and that by reason of words of incontinence spoken of her, they did not give her those sums. No judgment was given; but no difference can be made between spontaneous benevolence and things due of right. 1 *Ro. Abr.* 30. *Humphreys* v. *Stutfield*. An action lies for words of bastardy, on the principle that the Plaintiff's father and brother were less likely to convey, or permit their land to descend, to him on that account. In *Cro. Jac.* 213. *Vaughan* v. *Ellis*, the Plaintiff shewed on his declaration that he had several elder brothers, but that he might possibly have inherited, and in consequence of words spoken a certain person refused to purchase his chance of inheriting. The case of *Barnes* v. *Strudd*, which has been cited, is also reported in *Vent.* 4., and the reason there given for the judgment of the Court, is, that the action would not lie unless a special damage were shewn; now it appears by 1 *Lev.* 261., and two other reporters, that the damage assigned in the declaration, was, that "she incurred the displeasure of her parents, and *was in danger* of being turned out of doors," which clearly was not a sufficient damage: and the authority of the case in 1 *Ro. Abr.* 35. is not denied in *Vent.* 4.

Curwood in reply. All the cases cited are cases of legal damage. The value of customers to a tradesman is fully recognized by the law: so is slander of title. If

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this action lies, no words are not actionable with the aid of an ingenious special pleader.

HEATH J. Undoubtedly all words are actionable, if a special damage follows.

MANSFIELD C. J. This case is not distinguishable from that of *Hartley* v. *Herring*. We do not know how to say that this is not a special damage, sustained in consequence of words imputing infamy. They have deprived this lady of an income derived from the bounty of others, which now, after verdict, we must assume, would have continued, if the Defendant had not spoken these words. We cannot say the action will not lie.

Per Curiam, Judgment affirmed.

Nov. 25.

WOOD *v.* PLANT, who, *&c.* In Error.

Where, pending a suit, a party obtains a Judge's order for changing his attorney, it is unnecessary to file a new warrant.

THIS was a writ of error from a judgment in the Court of King's Bench. After the entry on the roll of the award of a *venire*, followed an entry of a Judge's order for changing the attorney in these terms: "Upon hearing the attornies or agents, on both sides, and by consent, I do order that Mr. *Mayhew* be appointed attorney in this cause for the Plaintiff instead of Mr. *Morris*. Dated the 3d day of *December* 1802. *S. Lawrence*." Then came the award of the fourth *venire*, after which was the following entry: "At which day, came the said *Edward Plant*, who sues as aforesaid, by the said *John Mayhew* his then attorney, appointed as aforesaid, in the place and stead of the said *Alexander Morris*."

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The principal errors assigned were the following; "that, by the record and proceedings aforesaid, the said *Edward*, in *Hilary* term in the 43d year of the reign of our Lord the now King, and in *Easter* term following, appeared and prosecuted the said suit by *John Mayhew* his attorney appointed by an order made in this cause on the 3d day of *December*, in the 43d year aforesaid, by the Honorable Sir *Soulden Lawrence* Knight, one of the Justices of our said Lord the King before the King himself; whereas, by the law of the land, the said *John Mayhew* could not be legally appointed attorney for the said *Edward*, for the purpose aforesaid, otherwise than by the warrant of attorney of the said *Edward* duly filed of record in the said Court; and when, in truth and in fact, the said *John Mayhew* had no warrant filed of record in the said Court, to appear and prosecute the said suit. Also, that there was introduced in the said record an order made out of Court and out of term by a single Judge of the said Court, and not appearing to have been ever made a rule of the said Court; and that the said order was entered upon the said record as of the term of *St. Michael*, although it appears to have been made on a day subsequent to the said term; and for that such order could only operate as a licence to the Plaintiff to change his attorney by the regular course of law, that is to say, by a warrant of attorney to be duly filed in the said Court, which had not been done."

Abbott, for the Plaintiff in error. In order to change an attorney, during the progress of a cause, two things are requisite; 1st, to obtain the permission of the Court, and, 2dly, by virtue of that permission, to appoint the attorney. In the present instance an order has been obtained, but no appointment has been made. The Judge orders in the usual terms, "that Mr. *Mayhew* be appointed attorney in this cause." Nothing however has been

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been done in pursuance of this order. At common law, no person could prosecute or defend a suit by attorney unless he had obtained the King's writ, or letters patent, or the special commission of the Court for that purpose. *Britton* 126. *Fitz. N. B.* 25. c. *Becher's Case*, 8 *Co. R.* 58. *b. p.* 116. 2 *Inst.* 377. Two things were requisite, (1,) to obtain the authority, (2,) to make the appointment. A similar permission is still necessary when the attorney is changed pending a suit. The proceeding in this case is analogous to the antient practice, and the same forms should therefore be complied with. The regular entry of warrants of attorney has been provided for by several acts of parliament. By the 18 *H.* 6. *c.* 9. they are ordered to be entered of record the same term in which the *exigent* is awarded. By the 32 *H.* 8. *c.* 30. *s.* 2. the warrant of attorney is to be delivered to the office in the same term in which the issue is entered. The statute 18 *El. c.* 14. contains a provision upon the same subject; and, by the 4th *Ann. c.* 16. *s.* 3. the attorney for the Plaintiff is directed, under the penalties imposed by former laws, to file his warrant the same term in which he declares. [*Mansfield* Ch. J. None of these regulations could have been complied with in the present instance, because the attorney was not changed till after the award of the *ventre.*] The statutes are mentioned for the purpose of shewing how much importance has always been attached to this object. The want of a warrant of attorney is error, and many judgments have been reversed upon this ground. The omission is indeed cured, after verdict, by the statutes of jeofails (*a*;) but in the present instance those statutes do not apply. If a *scire facias* be brought to revive a dormant judgment, there must be a new warrant. 2 *Ld. Raym.* 1252, 3. [*Heath* J. In that case the former warrant is determined;

(*a*) 32 *H.* 8. *c.* 30. 18 *El. c.* 14.

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the *scire facias* is a new action.] So the former warrant is determined in this case. The appointment, whenever made, must be entered of record. In *Rastall, fol.* 5. there is an entry of a case where the party first appeared in person, and afterwards made his warrant of attorney, which is regularly entered on the roll.

Manley, contra, after observing that the 25 *Geo.* 3. *c.* 80. *s.* 17. operated as a statute of *jeofails* with respect to this point, was stopped by the Court.

MANSFIELD Ch. J. What is the effect of the proceeding which is made the ground of the present exception? The Court orders Mr. *Mayhew*, at the request of the Plaintiff, to be appointed his attorney in this cause. It is true that the order is made by a judge at chambers; but still it is to be regarded as the order of the Court. The effect of these orders was much considered in the case of *The King* v. *Wilkes*, 4 *Burr.* 2570. They are as binding as any act of the Court, though they are not entered and made rules of Court, unless it be necessary to enforce them by attachment. The Court, then, has appointed the attorney; and it appears from the inquiries which we directed to be made, that it has never been the practice to file a new warrant in cases of this nature. Such a proceeding would indeed be superfluous; for when an attorney is appointed by the Court, at the request of the party, what reason can there be for a second appointment by the party himself? Were this objection allowed to prevail, we should, in effect, pronounce every judgment for ages past erroneous, where the attorney has been changed, during the progress of a cause, without the entry of a new warrant.

Per Curiam, Judgment affirmed.

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Nov. 26.

DELVER, Assignee of BUNN, v. BARNES.

In order to impeach an award, upon the face of which no objection appears, it is not sufficient to state facts from which it may be *inferred* that the award was founded upon an incorrect notion of the law of the case.

Semb. that if an arbitrator chooses to put the law out of the question; and to award the payment of a conscientious demand arising out of a transaction which he knows to be illegal, he may do so. *Quære.*

Semb. that if an underwriter transfer by parol to another, at a higher premium, his subscription to a policy, it is not such a re-assurance as is prohibited by stat. 19 *Geo.* 2. *c.* 37. *s.* 4.

THE Plaintiff delivered to the Defendant an account made up from the books of the bankrupt, in which he charged him with premiums of insurances, amounting to 209*l.* 10*s.* including therein 15*l.* for the premium of 100*l.* insured on goods by the ship *Ann*. The Defendant claimed to have allowed to him a counter-demand, amounting to 190*l.* 8*s.* 8*d.* including therein 100*l.* for a total loss on goods by the *Ann*, and paid into Court the balance of the Plaintiff's claim, being 18*l.* 1*s.* 4*d.* At the trial of this cause, at the Sittings after last *Trinity* term, the action was referred, and the arbitrator awarded that the Plaintiff should receive the *said* sum of 18*l.* 1*s.* 4*d.* paid into Court, as a full satisfaction of his demands.

Bayley Serjt. had, on a former day, obtained a rule *nisi* to set aside this award, upon an affidavit, stating that the Defendant's counter-demand, including the 100*l.* for the loss on the *Ann*, being deducted from the Plaintiff's demand, there remained exactly the balance of 18*l.* 1*s.* 4*d.* and inferring from that fact that the arbitrator had allowed that loss: and upon another affidavit, stating that the insurance on the *Ann* was made under the following circumstances, which were proved before the arbitrator. The Defendant, who was an insurance broker, had underwritten 100*l.* on the *Ann*, upon his own account, at a premium of eight guineas. He afterwards opened another policy for an insurance to a greater amount, on other goods by the same ship, at 15 guineas, and promised *Bunn* that he should have a line on the policy at that premium; but afterwards, forgetting his promise, he filled up the whole of that policy

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with the subscriptions of other underwriters. *Bunn* complaining of this treatment, the Defendant, in order to oblige him and to make good his promise, and not for the purpose of a reinsurance, verbally engaged that his own subscription on the first policy should stand and be for *Bunn* at the premium of 15 guineas; and though he had himself only received 8 guineas for that subscription, he allowed in account to *Bunn* the sum of 15 guineas, as the premium due to him for his underwriting this sum of 100*l.* on the *Ann.* The affidavit further stated the deponent's belief that this transaction was illegal, as being a reassurance, and that the award was therefore contrary to law; or if it was not a reassurance, then that there was no evidence whatever before the arbitrator of any contract of assurance on the ship *Ann* having been entered into by the bankrupt.

Best and *Onslow* Serjts. now shewed cause: they first observed that there was no objection to this award on the face of it, since it merely awarded a sum of money, and contended that it was not competent for the Plaintiff to impeach it upon account of the reasons which the deponent conjectures to have influenced the arbitrator to make such a decision. Secondly, they contended that this was not a reassurance; they said it was not within the mischief of the stat. 19 *G.* 2. *c.* 37. *s.* 4. because the Defendant had paid a greater premium than he had received: a reassurance is where a person receives a high premium for his subscription, and assures again at a lower premium. It is where two policies are effected on the same risk; which is not the case here. This transaction is of common occurrence in the city of *London*: the Defendant merely substituted *Bunn* to stand in his situation; it could not be said that he had indemnified himself from the risk which he had originally undertaken, by procuring another person to insure him against that risk:

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because there were not two contracts subsisting at the same time; there was only one subsisting contract of indemnity, and that was for indemnity to the original assured. They also relied on the innocence of the Defendant's intention in making this contract, and contended that if the point of law were now under discussion, the Court would decide with the arbitrator; but they urged that it was not clearly made out that the arbitrator had decided on the ground that the facts had been proved which were suggested. He himself had expressed no dissatisfaction at the award.

Bayley Serjt. in support of the rule. The ground of this award is clearly shewn; for it appears upon the facts stated, that this sum of 100*l.* for a loss on the *Ann*, ultimately becomes the only article in the account between the parties which is disputed. The arbitrator awards that the very sum paid by the Defendant into court is sufficient. Therefore it is apparent that he has attained this result by the same arithmetical process which the Defendant used in computing his balance, and that he has allowed the 100*l.* as a loss upon the *Ann*. The Plaintiff swears he believes the arbitrator has allowed this sum; the Defendant does not deny it, but proceeds to state reasons to justify the award, as being made upon that ground. The award then is wrong in law; for there are two objections to this contract. First, there is no stamped policy by which this supposed assurance is effected. By 35 *G.* 3. *c.* 63. *s.* 11. every assurance must be made on a policy. *Bunn* has underwritten no policy. No such evidence could be produced to substantiate a claim of *Barnes* against him for this loss. *Bunn* is at most only bound in honor to *Barnes*; but unless a claim is such as could be the subject of an action, it ought not to be admitted as an article of set-off. Secondly, if the former objection does not prevail, this is a reassurance

prohibited

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prohibited by the stat. 19 *G.* 2. *c.* 37. *s.* 4. The assured plainly could have no demand but upon *Barnes*. There subsists then a contract by which *Bunn* undertakes for a different premium to indemnify *Barnes* against the risk which the latter had insured on that policy. The motive of the contract is immaterial: the effect of it is, that *Barnes* will be enabled to recover from *Bunn* the amount of the money for which he has himself underwritten the policy, and to obtain an indemnity from all the consequences of his subscription. To deem such a contract legal, would be virtually to repeal this statute, the intention of which was, that every person who begins to insure upon a risk, shall continue the insurer to the end of the adventure.

MANSFIELD Ch. J. This contract, although it much resembles, yet does not fully amount to a reassurance, which consists of a new assurance, effected by a new policy, on the same risk which was before insured, in order to indemnify the underwriters from their previous subscription: and both policies are in existence at the same time. But I give no judicial opinion whether this would be a legal transaction. The statute doubtless was intended to prevent gambling. I suppose the mischief was, that policies were underwritten, at one premium, and reassurances effected at another. There is no recital in the preamble of the statute which applies to this section: the mere substitution of a different name does not seem to come within the mischief designed to be remedied by that act: and here if *Barnes's* line had been struck out, and *Bunn's* name inserted, with 15 guineas premium, all would have been right.

The Defendant's affidavit certainly does not deny the facts suggested on the part of the Plaintiff, but it shews this claim of set-off to be as conscientious a demand as ever was made. The circumstances strongly indicate

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that this sum of 100*l.* was included in the award, but there is no proof of the ground on which the arbitrator proceeded. The Court cannot take upon itself, therefore, to say that he has mistaken the law. This is a general submission of all matters in difference; it might have been referred to the arbitrator to decide whether the Defendant was legally entitled to set off this sum; but in this case no such restriction is imposed on his authority, as there might have been. I admit, that if an arbitrator says, "I meant to make my award according to law, and have misconceived the law;" or, "I have mistaken the fact;" the award shall be set aside: for in either case it is not his award, that is, not his true judgment; but the evidence here does not amount to that case. It was competent for the arbitrator to inform the Court upon what understanding of law or of fact he has decided; but he does not say, that even if he had known this to be an illegal contract, he should have made a different award. He is totally silent, and the ground of his decision is only matter of inference: in some cases it might be capable of demonstration.

In a reference of all matters in difference an arbitrator ought to consider not legal only, but also equitable demands, demands of all sorts (*a.*) How then can we say that

(*a.*) In *The South Sea Company* v. *Bumstead*, 2 *Eq. Cas. Abr.* 80. *pl.* 8. Lord *Talbot* Ch. is reported to have said, "It is true arbitrators are in the nature of judges, and in some respects have a greater latitude *not being confined within the rules of law or equity*, and therefore may make such allowances as could not be made in courts of judicature." And in *Knox* v. *Symonds*, 1 *Ves. jun.* 369. Lord *Thurlow* Ch. said, "Upon a general reference to arbitration of all matters in dispute between the parties the arbitrator has a greater latitude than the Court, in order to do complete justice between the parties; for instance, he may relieve against a right which bears hard upon one party, but which, having been acquired legally, and without fraud, could not be resisted in a court of justice;" and he instanced a case of *Perkins* v. *Okeins*,

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that he has made this award under a mistaken conception of the law on this subject? Besides, if the arbitrator is not right in the point of strict law, he is certainly right in

Okeins, where the Plaintiff being entitled to a specific performance of a very hard bargain, the Court recommended a compromise, and the Plaintiff released the Defendant on his paying a sum of money. His Lordship thought that if that case had been referred, the arbitrator might have awarded a release upon payment of a less sum than the Plaintiff there exacted, and that the award could never be set aside on that account.

And in *Ainsley* v. *Goff*, *B.R. Hil.* 1799, reported in *Kyd on Awards*, 351. where the arbitrators made an affidavit that "in disposing of the residue of a testator's effects, under a submission, they did not conceive they were making any distribution of it according to any fixed law on the subject, but that they were dealing out what appeared to them to be according to the best of their judgment, under all the circumstances of the case, strict and impartial justice, agreeably to what they *believed to have been the intention of the testator*;" the Court thought this a sufficient answer for them to discharge a rule obtained for setting aside the award, and are said to have laid down this distinction, "that when the arbitrators, knowing what the law is, or laying it entirely out of their consideration, make what they conceive under all circumstances to be an equitable decision, it is no objection to the award that in some particular point it is *manifestly against law*." *Quære* whether the distinction is not expressed too broadly by this writer? In *Morgan* v. *Mather*, 2 *Ves. jun.* 18. *Wilson* Lord Commissioner, speaking upon a general order of reference of all matters in dispute, says, "I am of opinion that when any thing is submitted to arbitration, the arbitrators cannot award *contrary to law*, because that is beyond their power; for the parties intend to submit to them only the *legal consequents* of their transactions and engagements." And in *Aubert* v. *Maze*, 2 *Bos. & Pull.* 375. *Chambre* J. says, "There is no doubt that an arbitrator is bound by the rules of law, like every other judge; and if it appear on the face of the award that the arbitrator has acted contrary to law, his award must be set aside." It is not clear in that case whether the arbitrator meant to take the opinion of the Court upon the legality of the insurance, or upon the propriety of his allowing a demand arising out of an illegal transaction.

 In

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in every other point. The sum of 100*l.* was really due in conscience: the Court ought not to set aside such an award unless they are compelled so to do, and I recollect no case where an award has been set aside upon such a suggestion.

Heath J. I am of the same opinion. This is a mere substitution of one name for another. It is a very proper and conscientious award.

Rule discharged, but without costs.

In the case of *Ainsley* v. *Goff*, the arbitrators appear to have been selected on the ground that they were supposed to be persons *well acquainted with the testator's intentions*, so that it seems to have been the design of all the parties to authorize the arbitrators to make such a will for the testator as they might conceive that he himself would have dictated in his lifetime, if he had been apprized that what he had then made was an ambiguous and imperfect disposition of his property; and they seem to have taken upon themselves to find as a fact what would have been the testator's intentions upon such a discovery; and to have grounded their award upon those intentions, rather than upon any construction of the subsisting will, or any regard to the statute of distributions. And then it seems to follow, that the Court could not set aside the award, for a very different reason; namely, that they had no power to re-examine the arbitrator's conclusions of fact. For in *Morgan* v. *Mather*, *Eyre*, *Ashhurst*, and *Wilson*, Lords Commissioners, all agreed that they could not review the conclusions of fact which the arbitrators had drawn; and upon an objection made to an article allowed in an account, *Eyre* there said, the question before him was, whether the arbitrators had decided upon fact or law; thereby intimating that if it could be ascertained what verdict, as it were, the arbitrator had found upon the facts, though the Court could not meddle with that, they would review the consequences of law which he had deduced from those facts. Upon this ground it may possibly have been considered, that it came within the scope of the arbitrators extraordinary authority in *Ainsley* v. *Goff*, to award as they did; and then that case cannot be considered as an authority to shew, that under a general submission an award may be made contrary to law. *Sed quære.*

1807.

DOE, on Demise of PATE, v. ROE.

Nov. 26.

After possession once given under a writ, the Plaintiff cannot sue out another writ of possession, though he be disturbed by the same Defendant, and though the sheriff have not yet returned the former writ.

SELLON Serjt. moved that a new writ of *habere facias possessionem* might issue in this case, on the ground that the lessor of the Plaintiff had been put into possession of the premises by virtue of a writ of *habere facias possessionem*, on the 22d *Feb.* 1806, and that on the 10th of *Oct.* 1807, while he continued in possession, one *Hunt*, against whom he had recovered the premises, entered into the house by force, and still forcibly held the same, and resisted with violence his attempts to regain the possession. *Sellon* stated, that this was the practice, in cases wherein the writ had not yet been returned and filed, and cited *Radcliffe* v. *Tate*, 1 *Keble*, 779., to shew "that after *habere facias possessionem* executed, if the party be turned out again by the Defendant's means, he may have a new *habere facias possessionem* on motion in court, and an attachment against him."

The Court denied the authority of the case in *Keble*, and held that possession having been given under the first writ, the sheriff ought to have returned, "that he had given possession," and that the Plaintiff could not afterwards have had another writ: an *alias* cannot issue after a writ is executed. If it could, the Plaintiff, by omitting to call on the sheriff to make his return to the writ, might retain the right of suing out a new *habere facias possessionem*, as a remedy for any trespass which the same tenant might commit within twenty years next after the date of the judgment.

Rule refused.

1807.

Nov. 27.

The KING v. The Sheriff of MIDDLESEX, in IRWIN v. HOGG.

If the Plaintiff has incurred the costs of instructing counsel to move for an attachment before the Defendant gives notice of his surrender, though he surrenders before the attachment is actually obtained, the Court will order the costs of those instructions to be paid by the Defendant upon setting aside the attachment.

THE Plaintiff had served the sheriff with a rule requiring him to bring in the body of the Defendant, the time for which expired on the 16th of *November*. The Defendant had given notice that his bail would justify on that day, but no bail being perfected, the Plaintiff on the same evening instructed his counsel to move for an attachment, which motion was made on the 17th. The bail gave notice at a later hour than nine o'clock in the evening of the 16th, that they should surrender their principal, which they accordingly did on the morning of the 17th, before the attachment was obtained, but after the costs had been incurred of instructing the counsel to move.

Best Serjt. having obtained a rule *nisi* to set aside the attachment,

Bayley Serjt. contended that if the rule should be made absolute, the Plaintiff would at least be entitled to receive the costs of instructing counsel to move, but he also claimed the costs of the attachment.

Best opposed this, on the ground that upon receiving the notice of surrender, the Plaintiff ought to have countermanded his instructions to counsel, and contended that the Defendant was entitled to set aside the attachment upon payment of the costs of the application only.

The

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The Court held that the Defendant should at least have tendered to the Plaintiff his costs of instructing his counsel to move for the attachment, because a notice delivered after nine o'clock at night is not considered as a sufficient notice, and it would be very difficult after that hour of the night to countermand the instructions, and the Court would have made the rule absolute, refering the costs to the consideration of the prothonotary;

But the Defendant not acceding to these terms, the rule was discharged with costs.

Bail are not permitted to justify till the costs of a former opposition are paid to the Plaintiff, though the Defendant is in custody.

The Defendant then moved to set aside the attachment for some other supposed irregularity, but failing to establish his case, consented to the terms before offered. He contended however on the authority of *Holward* v. *Andre*, 1 *Bos. & Pull.* 32. that the Plaintiff would not be entitled to the costs of opposing bail on a former occasion, at a time when the Defendant was in custody, and that though the Defendant had paid those costs through ignorance, they ought to be restored.

Bayley, on the other hand, contended, that whether the Defendant is in custody or not, if notice of justification of bail has been given, the Plaintiff is entitled to the costs of opposing them.

Per Curiam. The case cited has been very properly overruled (*a*,) because a vexatious prisoner may give repeated

(*a*) Defendant, a prisoner, had given four notices of bail, and the bail named in the last notice appearing in order to justify, were opposed until the costs of the former attendances should be paid, which was resisted by *Bayley* Serjt. The Court seemed strongly inclined to adopt the general rule of making the Defendant pay the costs of the former oppositions, as well in the case of a Defendant who was a prisoner, as of any other; but on the Defendant's attorney undertaking to pay the costs of one attendance, the Court made no order on the point,

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peated notices, a practice which has much prevailed in the time of vacation, by an abuse of the stat. 43 *G.* 3. *c.* 46. *s.* 6.

Rule absolute, on paying such costs as the prothonotary should direct.

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point, and the bail were permitted to justify. *Nov.* 1805. So held in the case of one notice in *Mitchell* v. *Claridge*. in *Feb*, 1806.

Nov. 27.

Moses v. Stevenson.

If, pending a rule for changing the venue, the Defendant plead to the action, and notice of trial be served, the Court will still allow the venue to be changed; and, in such case, no costs are payable.

A Rule *nisi* was obtained in this cause for changing the venue from the city of *London* to the county of *Stafford*. Before this rule could be made absolute, the time for pleading would have expired. The Defendant, therefore, while it was still pending, pleaded to the action, and notice of trial was served.

Best Serjt. shewed cause against the rule. He observed that there was one circumstance, namely, the notice of trial, in which this case differed from that of *Talmash* v. *Penner*, 2 *Bos.* & *Pull. p.* 12. At all events, if the rule should be made absolute, he submitted, on the authority of that decision, that it must be upon payment of costs. He also referred to the case of *Herbert* v. *Flower and Others*, *Barnes* 492. *edit.* 3.

The Court. The Plaintiff would be entitled to costs if any had been necessarily incurred by this motion. But what costs can it have occasioned? The plea is precisely the same whether the venue be in the city of *London*, or

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in the county of *Stafford*. The Defendant has put himself upon the country; and, when the venue is changed, the country will be a jury of the county of *Stafford*. As to the notice of trial, it should not have been served after the rule was obtained.

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Rule absolute.

Bayley Serjt. in support of the rule.

HARRIS *v.* MULLET.

Nov. 28.

Where the Defendant was summoned to appear before the king's justices at *Westminster* upon the morrow of *Saint* ——, the Court held that the defect might be waived by his subsequent conduct.

A Summons upon an original *quare clausum fregit*, returnable on the morrow of *St. Martin*, was served on the Defendant, upon the 12th of *November*, to appear before the King's Justices at *Westminster*, on the morrow of *Saint* ——— to answer the Plaintiff in a plea of trespass. The Defendant not having appeared, two writs of *distringas* successively issued, and 6*l*. was levied. When the sheriff's officer called to execute the first writ, the defendant informed him that he had sent his wife to town to settle the action. A rule *nisi* having been obtained for setting aside the proceedings on account of the irregularity, and for the return of the money levied,

Shepherd Serjt. contended, upon the above facts, that the Defendant was too late in his application, and must be considered as having waived the irregularity.

Best Serjt. *contrà*. This is not an irregularity, but a defect of process, and therefore cannot be waived. In this case there was, in effect, no summons. The *distringas* issued against the Defendant on account of his not having done that which he was never required to do.

The

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HARRIS v. MULLETT.

The Court. The Defendant should have been earlier in his application. It is evident, from his conversation with the officer, that he understood what was to be done.

Rule discharged.

Nov. 28.

FOUNTAIN, Administrator of CRUMP, *v*. YOUNG.

The 46 Geo. 3. c. 87. (the Court of Requests act for the Borough of Southwark) f. 12. contains an exception of any debt for any sum, being the balance of an account on demand originally exceeding 5*l*. A debt, originally above 5*l*., but reduced, by a partial payment, below that sum, is within the exception.

An application for costs, under the 43 Geo. 3. c. 46., cannot be supported by a reference to the notes of the Judge before whom the cause was tried.

An affidavit made to support such an application, must shew there was no reasonable or probable cause for the arrest.

A Rule was obtained, on a former day, calling on the Plaintiff to shew cause why a suggestion should not be entered on the record in this action, pursuant to the stat. 46 *Geo*. 3. *c*. 87. (the *Southwark* Court of Requests act,) or, why the Defendant should not be *excused* from the payment of costs, under the 43 *Geo*. 3. *c*. 46. *s*. 3.

The action was brought by the Plaintiff, as administrator of *Crump*, to recover twenty-four pounds for goods sold and delivered by the intestate to the Defendant. Upon the trial, evidence was given of a conversation between the Defendant and the Plaintiff's attorney, in which the former admitted the debt, but insisted that he was entitled to deduct the amount of two promissory notes which the intestate had received from him after they became due, for the purpose of obtaining payment from the maker, and which he had lost or mislaid. It did not appear that the intestate had ever received any money upon them, but the maker had since absconded. The Defendant was arrested and held to bail for 24*l*. The jury, upon the trial, found a verdict for the Plaintiff, damages four pounds, deducting from his whole demand the amount of the notes.

The Defendant, in his affidavit, stated that "at the time of commencing this action he was, and still is, resident

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FOUNTAIN v. YOUNG.

dent within the jurisdiction of the court of requests for the town and borough of *Southwark*; that the Plaintiff recovered at the trial of the cause only four pounds; and that the Defendant was arrested for 24*l*. and held to bail for that sum."

Shepherd Serjt. upon shewing cause contended, that neither part of the rule could be sustained. As to the first point, he observed that, though, by the 13th section of the stat. 46 *Geo.* 3. it was provided, that where the debt did not exceed five pounds, the Plaintiff should not be entitled to costs, yet, by the 12th section of the same statute, there was an exception with respect to "any debt for any sum being the *balance of an account on demand originally exceeding five pounds*." The present case fell precisely within the terms of this exception. There was, if possible, still less ground to sustain that part of the rule which was founded upon the 43d *Geo.* 3. In the application of this act of parliament the Courts have been governed by the same rule as in actions for maliciously holding to bail. But there was no evidence before the Court to shew that the conduct of the Plaintiff in this instance was influenced by motives of malice, or by any disposition to vex or harass the Defendant. Neither could it be said that the arrest was without reasonable or probable cause. The Plaintiff was an administrator; he found the debt charged in the books of the intestate; and the situation of a person suing in that character would be hard in the extreme, if the act were held to apply to a case circumstanced like the present.

Onslow Serjt. *contrà*. If the construction which is applied to the 46 *Geo.* 3. were allowed to prevail, the object of the act would be in a great measure defeated; because it would always be sufficient, for the purpose of taking a case out of the statute, to prove that a debt of upwards

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upwards of five pounds had, at some period, subsisted between the parties, though reduced by successive payments below that sum. But the clause in the 12th section relates only to the balance of *accounts*, and not to the balance or *residue* of a *demand*. It is necessary that there should be a mutuality to bring the case within the exception; and, accordingly, in similar acts of parliament, this construction has always prevailed. The notes delivered in this case were in fact a payment, and, without a notice of set-off, might have been given in evidence for the purpose of reducing the Plaintiff's demand. As to the second point, it has been observed, that, in order to bring the case within the statute 43 *Geo.* 3., there must be some proof of malice, some evidence of an intention to vex and oppress the Defendant. But that is sufficiently apparent in the present instance; for the Plaintiff, at the time when he arrested the Defendant, and held him to bail for 24*l.*, must have known that four pounds was the utmost that he could, by any possibility, recover. This is clear from what passed at the trial, and may be established by a reference to the notes of the learned Judge. The arrest therefore was not for the purpose of obtaining security, but must have proceeded from an intention to harass the Defendant.

MANSFIELD Ch. J. That part of the motion which is founded on the statute of 43 *Geo.* 3. cannot be sustained for many reasons; but it is sufficient to observe, that it does not appear on the face of the affidavit, that there was no reasonable or probable cause for the arrest. It is merely stated that the arrest was for 24*l.* and that the Plaintiff recovered only 4*l.* The Defendant cannot supply this defect by a reference to the facts proved at the trial; for if that were allowed, it would be necessary for the parties to come prepared to try, not only the issue joined between them, but also whether there was any reasonable

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or probable cause for the arrest. But it is not for the Judge or the jury to decide that point. The evidence must be adduced to the Court to which the application is made. As to the other part of the rule, the question must turn upon the construction of the terms of the exception contained in the 12th sect. They are particular. The act is not to extend "to any debt for any sum being the *balance of an account on demand originally exceeding 5l.*" This can only apply to the case of a demand originally above 5*l.*, but reduced by subsequent payments. It is not necessary therefore, in order to take the case out of the operation of the statute, that the reduction should be by means of a set-off. It seems to have been the intention of the Legislature that long and intricate accounts consisting of various items should not be tried before this inferior tribunal. Upon the investigation of a case arising out of a debt, originally amounting to a considerable sum, but reduced by payments below 5*l.*, many nice and difficult questions might arise. The present case then falls within the exception contained in the statute. The demand, which originally exceeded 5*l.*, has been reduced by a particular kind of payment.

HEATH J. was of the same opinion.

CHAMBRE J. observed, as to the second part of the rule, that the terms of it were not conformable to the statute. By the 43 *Geo.* 3. costs are given, under the circumstances stated in the act, to the Defendant; but, in the present case, the rule is, that the Defendant may be *excused* from the payment of costs.

Rule discharged.

1807.

Nov. 28.

Ball v. Adrian.

If an action be brought without the knowledge of the Plaintiff, who is out of the realm, the Court will require security for the costs to be given on the part of the plaintiff.

THE Plaintiff went to *America* before the cause of this action arose, leaving a power of attorney to dispose of her effects here to one *Guest*, who employed the Defendant to sell some goods by auction, and directed this action to be brought for the proceeds. The Defendant had obtained a rule *nisi* that the Plaintiff might give security for the costs, and that the Plaintiff's attorney might produce the authority under which he sued The Court discharged that part of the rule which required the production of the authority, but as to the security for costs, made the

Rule absolute.

Nov. 28.

Scholey and Another v. Mansell Powell.

Notice of applying to a wrong Court for discharge of an insolvent is not cured by the Plaintiff's opposing his discharge.

VAUGHAN Serjt. opposed the discharge of the Defendant, an insolvent debtor, on the ground that his notice was, "that he intended to petition his Majesty's Court of King's Bench for Relief." The Court were at first inclined to think the irregularity was cured by the Plaintiff's appearing to oppose him; but on the consideration that he would certainly have been discharged if the Plaintiff had not appeared, they remanded the prisoner.

1807.

LEVY *v.* HAW.

Nov. 28.

The Defendant, in consideration of his having procured one *D.* to serve on board the ship *W.* for a particular voyage, received from the Plaintiff 4 guineas, and afterwards signed a note, by which he engaged "to pay the Plaintiff 4 guineas if the said *D.*, *a seaman*, did not proceed in the said ship upon the intended voyage." It was discovered that *D.* was not a seaman, and the captain of the *W.* refused to receive him. The Court held that the above note did not amount to an undertaking on the part of the Defendant, that *D.* was a seaman, but was merely a stipulation for his personal service.

Qu. If the Defendant had undertaken to procure a seaman, whether under the above circumstances, the 4 guineas paid by the Plaintiff could have been recovered upon a count for money had and received to his use.

THIS cause was tried before *Mansfield* C. J. at the Sittings after last *Trinity* term, at *Guildhall*. The declaration stated "that the Plaintiff, at the special instance and request of the Defendant, had retained and employed him to procure for him the said Plaintiff, a certain person to serve, as a seaman or mariner, in and on board of a certain ship or vessel called the *Walthamstow*, in and upon a certain voyage; that the Defendant, in pursuance of such retainer, had procured and provided one *Thomas Dorthy* to sail, as such seaman and mariner as aforesaid, in and on board the said ship or vessel in and upon the said voyage; and that thereupon, afterwards, &c. in consideration that the said Plaintiff, at the like special instance and request of the same Defendant, would pay to him a certain sum of money, to wit, the sum of 4*l.* 4*s.* of lawful *British* money, for his trouble in that behalf, he the said Defendant undertook, and to the said Plaintiff then and there faithfully promised to pay him the said Plaintiff 4*l.* 4*s.* in case the said *Thomas Dorthy* did not proceed in the said ship or vessel called the *Walthamstow*, in and upon the said voyage; that the Plaintiff, confiding in the said promise and undertaking of the said Defendant, afterwards, &c., at the like special instance and request of the said Defendant, did then and there pay to him the said sum of 4*l.* 4*s.* for his trouble in and about the procuring the said *Thomas Dorthy* to serve as such seaman as aforesaid, and that he the said Defendant then and there had and received the same of the said Plaintiff; that, although

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the said ship or vessel afterwards, &c. did proceed on the said voyage; and, although the said Plaintiff always, from the time of making the said promise and undertaking of the said Defendant, until and at the said time when the said ship or vessel so proceeded on the said voyage, was ready and willing to accept and receive the said *Thomas Dorthy* in and on board of the said ship, and to permit him to proceed therein on the said voyage, yet that the said *Thomas Dorthy* did not, nor would, proceed in the said ship in and upon the said voyage, but wholly refused and neglected so to do, and therein wholly failed and made default." It then stated the refusal of the Defendant to pay to the Plaintiff the aforesaid sum of 4*l.* 4*s.*, according to the form and effect of his said promise, &c. The declaration also contained the usual counts for money lent, money had and received, &c. The Defendant pleaded the general issue. The evidence offered for the purpose of establishing the contract between the parties, was a written note or memorandum, by which the Defendant promised to pay the Plaintiff four guineas "*if Dorthy*, a seaman, did not proceed in the *Walthamstow* upon the voyage to which she was then destined." *Dorthy* was sent on board the vessel at *Gravesend*. It was immediately discovered that he was not a seaman, and the captain refused to receive him. Upon this *Dorthy* said, "here I am ready to go;—if you won't take me, I can't help it." He was afterwards put on shore, and the Defendant promised to pay the Plaintiff the four guineas upon his arrival in *London*. It was objected upon this evidence, that the breach of the contract was not proved as laid in the declaration, and that the Plaintiff must therefore be nonsuited. On the other side it was contended that the Defendant had undertaken to procure *a seaman*, that he had not performed his undertaking in this respect, and that the Plaintiff was therefore entitled to recover the four guineas upon the count

for

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for money had and received, the consideration for the payment having failed. A verdict was ultimately taken for the Plaintiff, with liberty to the Defendant to move that a nonsuit might be entered.

Accordingly a rule *nisi*, for that purpose, having been obtained upon a former day,

Vaughan Serjt. shewed cause. The Defendant undertook to procure a seaman to serve, for a particular voyage, on board the *Walthamstow*. He received, from the Plaintiff, four guineas for his trouble. It afterwards appeared that *Dorthy*, the person provided by the Defendant, was not a seaman, and the captain therefore refused to receive him. The consideration for the four guineas paid to the Defendant has wholly failed, and the Plaintiff is, consequently, entitled to recover back this sum upon the general count. In the case of *Giles and others* v. *Edwards*, 7 *T. R.* 181. the Plaintiff had paid twenty guineas upon a special agreement relative to the sale of wood. The Defendant had neglected to perform his part of the contract, and the Plaintiff was permitted to recover back the twenty guineas as money had and received to his use. It was objected that the contract was still open; but the learned Judge (*Lawrence*,) who tried the cause, was of opinion that "as it was owing to the fault and negligence of the Defendant that the contract, which was entire, was not carried into execution, the Plaintiffs were at liberty to consider the contract at an end, and recover back the money they had paid, the consideration having failed." The same reasoning will apply in the present instance. The consideration has failed, the Defendant has not procured a seaman, and the Plaintiff is, therefore, entitled to regard the contract as at an end. In this case too the Defendant consented that the agreement should be rescinded. He admitted that he had not

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performed his engagement, and promised to repay the money upon his arrival in *London*.

Best Serjt. *contrà*. It is material to consider the nature of this agreement. The Defendant promises to pay the Plaintiff four guineas if *Dorthy*, a seaman, does not proceed upon a certain voyage. It is admitted that there is no ground for imputing the breach stated in the declaration. It is supposed, however, that the Defendant, by this agreement, undertook to pay the four guineas, not only if *Dorthy* should refuse to proceed on the voyage, but if he should prove not to be a seaman. But this was not the object of the contract, which was intended merely to secure the personal service of *Dorthy*. Admitting, however, the construction contended for, still the Plaintiff could not recover on the general count. The only question in these cases is, whether the agreement between the parties be a subsisting agreement. For, if the contract be still in force, it is clear that the Plaintiff cannot recover upon the count for money had and received to his use. The Defendant here promises to pay a sum of money to the Plaintiff in a certain event; that event is supposed to have occurred, but the money has not been paid. It is evident, therefore, that the contract, which is for the payment of the money, still continues in operation; and it is upon this contract alone that the Plaintiff is entitled, if at all, to recover. But it is supposed that the Defendant has himself put an end to the contract by promising to pay the four guineas upon his arrival in *London*. This offer cannot affect the contract; it only proves that the Defendant thought he was bound to return the money. Neither was it in the Defendant's power to rescind the agreement; the assent of the Plaintiff would also have been necessary for that purpose. *Smith* v. *Field*, 5 *T. R.* 405. But the Plaintiff,

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far from assenting to this, has considered the contract as still subsisting; he has declared upon it; and, if he had proved the breach stated in the declaration, he would have been entitled to recover. In the case of *Towers* v. *Barrett*, 1 *T. R.* 133., the contract was at an end, and the money was therefore held by the Defendant against conscience and without consideration. But it was observed by the Court, both in that case and in *Weston* v. *Downes* 1 *Doug.* 23., that if the contract had been still open, it must have been specially stated. The same observation will apply to the case of *Giles and Others* v. *Edwards*. The Plaintiff had there put an end to the contract, which the Court held he was entitled to do in consequence of the Defendant's default. In *Cooke* v. *Munstone*, 1 *N. R.* 351., it was determined that the Plaintiff could not recover, upon the general count, the sum which had been paid as earnest, to the Defendant, because the contract still continued in force. Where there is a special contract the Defendant ought to have notice by the declaration that he is sued upon that contract, according to Lord *Mansfield's* observation in the case of *Weston* v. *Downes*.

Cur. adv. vult.

The opinion of the Court was now delivered by

MANSFIELD Ch. J. It is stated in the declaration, that "the Plaintiff was willing to receive *Dorthy* on board the *Walthamstow*, and to permit him to proceed therein on the said voyage, but that *Dorthy* did not, nor would, proceed in the said vessel upon the said voyage, but wholly refused and neglected so to do." It appeared, however, upon the trial, that *Dorthy* was willing to go, but the captain refused to receive him. Upon that part therefore of the case there was an end of the action. It is contended, however, that the Plaintiff is entitled to

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a verdict upon a supposition that there was some other contract between the parties, namely, a general contract to procure a seaman; and that, as the Defendant did not procure a seaman, the Plaintiff is entitled to claim the four guineas as money had and received to his use. But it is sufficient to observe that no evidence was given of such a contract. The only evidence offered, as to the agreement, was a note, in which the Defendant promised to pay the Plaintiff four guineas, if *Dorthy, a seaman*, did not proceed upon the voyage. It seems to have been understood between them that *Dorthy* was a seaman, and all that the Plaintiff required was some security that he should proceed upon the voyage. It afterwards indeed turned out that *Dorthy* was not a seaman; but no evidence was offered to prove that the Defendant had undertaken to procure a seaman, and there is therefore no ground to support the action for money had and received. It is not necessary to say what judgment the Court might have given if such a contract had been proved. It is sufficient to observe that the agreement in this case related only to the service of *Dorthy*, and, as no breach of this agreement was proved, judgment of nonsuit must be entered.

Per Curiam, Rule absolute.

IN THE EXCHEQUER-CHAMBER,

1807.

November 21; and

SERJEANTS' INN,

November 30.

The KING *v.* JAMES BULLOCK.

The great seal of *Great Britain* has been destroyed, and a new great seal of the United Kingdom of *Great Britain and Ireland* is in use, since the union with *Ireland*, to seal such matters as before issued under the great seal of *Great Britain*. Where a statute made before that union directs an instrument to issue under the great seal of *Great Britain*, it now properly issues under the great seal of the United Kingdom.

And if it be alleged in pleading that an instrument issued under the great seal of *Great Britain*, and evidence be given of an instrument issuing under the great seal of the United Kingdom, this is no variance.

The stat. 46 G. 3. *c.* 135. *s.* 3. which makes a docket *notice* of a prior act of bankruptcy, does not make it *proof* of a prior act of bankruptcy, nor proof of a prior debt sufficient to sustain a commission.

It is not sufficient, in order to invalidate a commission of bankrupt, to prove a prior act of bankruptcy, without also proving a prior debt sufficient to sustain a commission.

It is not competent for a bankrupt to set up a former act of bankruptcy, in order to invalidate his commission.

Semb. That commissioners of bankrupt may receive evidence of the act of bankruptcy from a creditor who seeks to prove under the commission.

Or at least if they do, after evidence *aliunde* of the act of bankruptcy, proof that the commissioners declared the bankrupt to be such on the creditor's evidence, will not disprove the allegation that he was "duly declared a bankrupt."

An instrument issuing, (as a commission of bankrupt,) under the great seal of the empire, is not such a "process or mandate issuing under the seal of the Court of Chancery," as is subject to the stamp imposed by 44 G. 3. *c.* 98. *sched.* 1. upon instruments of the latter denomination.

THE prisoner, a bankrupt, was tried at the *Old Bailey* sessions in *September* 1807, before *Heath* Justice, upon (*a*) an indictment framed in pursuance of

(*a*) *Heath* J. remarked that some editions of the Statutes do not give this act correctly, having in *s.* 1. the words "being thereof convicted by judgment or information," but that in the parliament roll the words are "by indictment or information."

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of the stat. 5 *Geo.* 2. *c.* 30. *s.* 1. "for concealing, "removing, and embezzling personal property to the "amount of 20*l.*, with an intent to defraud his creditors." The commission of bankrupt produced upon the trial was engrossed on a treble sixpenny stamp, and was granted under the great seal of the United Kingdom of *Great Britain* and *Ireland*. It was in proof that the only evidence produced before the commissioners of the act of bankruptcy, which the prisoner had committed by departing from his dwelling-house about the 1st of *May* 1807, was that of *Wm. Briant*, who was a creditor at the time of giving his testimony, and afterwards proved his debt under the commission, and that the commissioners upon his sole evidence declared the prisoner a bankrupt. It was also in proof that the prisoner had absented himself from his dwelling-house to delay his creditors on the 10th of *July* 1806, and that the debt on which the present commission issued did not become due to the petitioning creditor till after the 30th of *July* 1806; that on the 30th of *July* 1806 one *Hudson Atkinson*, a nephew and clerk of the prisoner, struck a docket against him, but no commission was ever issued thereon. On behalf of the prisoner it was contended that by the stat. 46 *Geo.* 3. *c.* 135. *s.* 3. this docket was not only notice to the petitioning creditor, but was also of itself conclusive evidence of a prior act of bankruptcy and of a prior debt sufficient to sustain a commission, but the Court at the trial held otherwise; this ground was again tried in the subsequent arguments, but abandoned upon an intimation from the Court that it was not tenable. The prisoner was found guilty, and received sentence of death, but execution was respited at the instance of *Heath* J. until the opinions of the Judges could be had upon several objections which were taken on behalf of the prisoner. The case was argued before eleven Judges, (*Rooke absente.*) The only four objections now relied upon, were the following,

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two of which, namely, the first and third, affected the sufficiency of the proof given upon the trial; the other two impeached the validity of the commission, on which the indictment was grounded. It was contended,

1st, That the prosecutors had failed to prove a material allegation averred in every count of the indictment, namely, that a "commission of bankrupt under the great "seal of *Great Britain* was in due manner awarded," and that this variance was fatal; or if it was no variance, then that the allegation was error apparent on the face of the indictment.

2dly, That evidence having been given of an act of bankruptcy prior to the petitioning creditor's debt, the commission of bankrupt was void.

3dly, That the evidence failed to prove a material allegation contained in the two first counts of the indictment, "that the commissioners did in due manner, and "upon good proof, upon oath then and there taken be-"fore them, find that the prisoner did become a bank-"rupt;" and a material allegation in the two last counts, "that the prisoner was in due manner found and de-"clared a bankrupt."

4thly, That the commission was void, not being marked with the stamps required by the several stamp acts.

Holroyd, for the prisoner. The stat. 13 *Eliz.* c. 7. s. 2. authorizes the Lord Chancellor to name commissioners by a commission under the great seal of *England*. The great seal of *England* was, at the time of passing that act, the seal of the empire, the king's seal, the *clavis regni*, 2 *Inst.* 551. It was the intention of that, and of all the subsequent statutes, that the commission should be awarded under the seal of the empire. The great seal of *England* continued to bear that character till the statute for the Union with *Scotland*, when the great seal of *Great Britain* was substituted, and commis-

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sions were thenceforward to issue under that seal. As the empire has been enlarged from time to time, the seal of the empire has acquired a new denomination; and since the union with *Ireland*, the great seal of the United Kingdom of *Great Britain and Ireland* is, by consequence of law, become the *clavis regni;* and those instruments which formerly derived their authority from the great seal of *England*, must now pass under the great seal of the United Kingdom. It is true, the statute for the union with *Scotland* has some express regulations for this purpose, which are not inserted in the act for the union with *Ireland*. By the stat. 5 *Ann. c.* 8. *art.* 24. " there shall be one great seal for the United Kingdom different from the great seal then used in either kingdom," and a great seal in *Scotland* is directed to be kept and used in all things relating to private rights or grants. But the former part of this provision was unnecessary, for as the whole became one kingdom, the great seal would, without this enactment, by a necessary consequence of law, have become the king's great seal of the whole, and not of any part; it must be still the *clavis regni.** By 5 G. 2. c. 30. *s.* 1. the commission was directed to issue under the great seal of *Great Britain*, which, at the time of passing that act, was the great seal of the empire. The stat. 39 & 40 *Geo.* 3. *c.* 67. *s.* 1. for the union of *Great Britain* and *Ireland*, assumes, that without any express provision the great seal would, after the union, become the great seal of the United Kingdom, and that those matters which before passed under the great seal of *Great Britain* would thenceforth pass under the great seal of the United Kingdom. In the 4th article it is enacted, that the proclamations for holding all future parliaments shall issue under the great seal of the United Kingdom. Section 3. contains an express provision, that the king may continue to use the old seal of *Ireland* within that part of the United Kingdom; but no such power is given

given to continue the use of the old seal of Great Britain. Without this provision, the king could not now, by virtue of his prerogative, use a separate great seal for *Ireland*, being part of his kingdom, any more than he could use a separate great seal for any part of *Scotland*, or for any county in *England*; and as Great Britain is now only a part, he could now no longer use a separate seal for Great Britain. If this be so, there is an important variance between the indictment and the commission proved; for it is averred to be under the great seal of Great Britain, and it is proved to be under the great seal of the United Kingdom. The question will not be affected by the circumstance that subsequent statutes have miscalled the great seal. It still remains the great seal of the United Kingdom; and every allegation in pleading, especially in an indictment, must be stated according to its strict legal import, and must be proved with equal strictness. It is true that though a statute gives inaccurate names to things, if the Courts can discover its meaning, they will so expound it, as to give force to the intention of the legislature; but that rule of law cannot be drawn in aid, to cure such a variance from an allegation in pleading, as this is. The statute 5 *Geo.* 2. *c.* 30. requires the commission to be under the great seal, and the king's grants and all instruments that require the great seal, must in pleading be alleged to be under the great seal. 2 *Co.* 16. So that the averment cannot be rejected as surplusage. But they must be alleged to be under such a great seal as will give them validity: such was antiently the great seal of *England*, afterwards that of Great Britain, and now that of the United Kingdom. The allegation is a material one, because to the great seal such instruments owe all their authority. *Expressio unius est exclusio ulterius*; and the indictment shews this commission to have issued under the great seal of a part of the United Kingdom only, not of the whole, under a seal

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seal therefore which can give it no validity. If the great seal of *Ireland*, or of a particular county, or of any other part of the kingdom, were averred, it would not be proved by evidence of the great seal of the United Kingdom; neither is the allegation of the seal of *Great Britain* proved by that evidence. Therefore either the indictment is erroneous on the face of it, or the commission set out is not proved.

Secondly, It was proved at the trial that an act of bankruptcy was committed before the petitioning creditors' debt accrued: and evidence was offered that other debts, sufficient to sustain a commission, subsisted at the time of the former act of bankruptcy. [*Heath* J. No such evidence was tendered; nor, if it had been tendered, would it have been received.] Consequently the prisoner was disabled to contract a debt with the petitioning creditor: there was no such debt existing, and the commission is therefore void. This was so ruled in 1736 by Lord *Talbot*, Chancellor, in *De Goles* v. *Ward*, *Forrester* 243. S. C. 1 *Cooke's Bank. Laws* 26.; and though that decree was afterwards reversed in the House of Lords, yet the reason which the Judges assigned for the reversal was, that, "as the commission issued when the old statutes relating to bankrupts were in force, they had considered it on the foot of those old statutes (*a*.)"

(*a*) There is some difficulty in understanding the reason assigned by the reporter; for the 5 *Geo.* 2. *c.* 30. attached from the 14th of *May* 1729, but the petitioning creditor's debt, which was upon a note given for the balance of an account, accrued, as it appears from 4 *Brown. Parl. Cas.* 324. on 7th July 1730, and the commission issued on 20th *Nov.* 1730. It might appear probable that some of the original items in the account, for the balance of which the note of 7th *July* was given, had accrued before 24th *May* 1729, and that the commission was sustained upon the proof of some of those items, if the reporter's statement and the whole tenor of the argument did not seem to confine the proof expressly to the note of the 7th *July* 1730.

So

So, in the case of *Ex parte Wainman*, 21st *October* 1738, 1 *Cooke* 27. the *Lord Chancellor* said, that the Judges would "have been of another opinion in *De Goles* v. *Ward*, if the case had arisen on the act of 5 *G.* 2.; for by that act the bankrupt is to be discharged of those debts only which had accrued before the act of bankruptcy was committed, and a creditor can prove those debts alone, of which the bankrupt's certificate will discharge him; and therefore no creditor can be received to prove under the commission, unless his debt was subsisting when the act of bankruptcy was committed." The prisoner was already a bankrupt when the petitioning creditor's debt was incurred. [*Heath* J. How does it appear that any debt subsisted at the time of the prior act of bankruptcy, which would have enabled a creditor to petition? To make a man a bankrupt, there must be circumstances under which a commission might issue, and these cannot be, unless there subsists a petitioning creditor's debt.] In *Toms* v. *Mylton*, 2 *Str.* 734. a commission was held void because an act of bankruptcy was proved to have taken place before the petitioning creditor's debt accrued. [Lord *Ellenborough* C. J. It does not in that case appear but that a previous debt was proved upon which a commission might issue, and that this is included in the reporter's expression that he "*was a bankrupt.*"] In 2 *Str.* 1042. *Ambrose* v. *Clendon*, S. C. *Analy. Cas. B. R. temp. Hardw.* 267., the same point was determined, and the commission there was supported only upon the simple contract debt which subsisted before the first act of bankruptcy, and which was held not to be extinguished by subsequently accepting the bond of the bankrupt.

3. The prisoner was not "upon good proof found to be, and duly declared a bankrupt." The same proof was necessary before the commissioners, which is required in any other court of criminal jurisdiction. The

witness

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witness on whose testimony the prisoner was declared a bankrupt, rendered himself competent before the trial by releasing his rights, but clearly was not such a witness, at the time when he gave his evidence before the commissioners, as could have been received in a court of law. And if he was not a competent witness, the prisoner was not "upon good proof found," nor "duly declared" a bankrupt. It is true that the stat. 5 G. 2. c. 30. s. 26. directs the commissioners to receive affidavits from creditors of the amount of their debts, and s. 29. seems to countenance the admission of creditors to swear *vivâ voce*, by enacting, "that persons swearing falsely shall be guilty of perjury;" and the 25th section, which enacts that every creditor shall be at liberty to prove his debt, may perhaps, by the aid of the other changes abovementioned, properly admit the like construction: but these statutes make the evidence of creditors competent, only for the purpose of dividing the property among themselves, not competent to subject any persons to a criminal jurisdiction. In order to do that, the same evidence must be necessary in this, as in all other cases. [Lord *Ellenborough* C. J. The statute enables the commissioners to examine all persons. *Mansfield* C. J. It never yet was asked on a trial at law founded on a bankruptcy, upon what evidence the commissioners declared the man a bankrupt.]

4. Ever since the year 1726 it has been the practice to issue commissions of bankrupt upon a treble sixpenny stamp, which by the statutes 5 *W.* & *M.* c. 21. s. 1. 9 & 10 *W.* 3. c. 25. s. 31. and 12 G. 1. c. 33. s. 2. is required for "every process or mandate" under the seal of any of the courts at *Westminster*, &c. And of this denomination is the commission in question: for it issues under the seal of the high Court of Chancery; but the stamps are wanting in this case, which are imposed by the statutes 32 G. 2. c. 35. s. 1. and 23 G. 3. c. 58. s. 1.

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on "every process or mandate." [Lord *Ellenborough* C. J. Is this a mandate? Or does it bear the seal of any Court? It is the seal of the kingdom.]

Gurney, for the prosecution. It was a matter of especial legislative provision in 5 *Ann.* c. 8. that the great seal of *Great Britain* should thenceforth be used in all cases where the great seal of *England* had before been used. It is not demonstrated, nor does it follow as a necessary effect of the union with *Ireland*, that without this provision the great seal of the United Kingdom would be used in all cases where the great seal of *Great Britain* was formerly used. The articles of union with *Ireland* pursue the act of union with *Scotland* in no one particular. All that can be gathered from 39 & 40 G. 3. is, that the great seal of the United Kingdom is spoken of: but no further inference can be drawn from that circumstance, than from the mention of the great seal of *Great Britain* in many statutes subsequent to the union with *Ireland*. 41 G. 3. c. 90. s. 5. mentions the great seal of *England* and the great seal of *Ireland*, 41 G. 3. c. 108. ss. 1, 2. the great seal of the United Kingdom. In 43 G. 3. c. 160. s. 25., 43 G. 3. c. 96. s. 11., 44 G. 3. c. 98. page 193., 45 G. 3. c. 91. s. 1., 46 G. 3. c. 54., 46 G. 3. c. 80. s. 2., 46 G. 3. c. 128. ss. 2. 5. the great seal of *Great Britain* is spoken of and directed to be used. There is in fact only one great seal used in *England*, which is the great seal of the United Kingdom. The old great seal of *Great Britain* was, soon after the union with *Ireland*, destroyed in the presence of the Lord Chancellor. The Admiralty Courts have since the union sat and inflicted sentence of death by virtue of a commission issued under the great seal of *Great Britain*, and it would be strange to say the indictment is vitiated by using the expression which is the language of so many acts of parliament. And if the law, since the Union, con-

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construes a statutable requisition of the great seal of *Great Britain* to mean the seal of the empire, and to be substantially satisfied by the use of the great seal of the United Kingdom, it will apply the same construction to the same words, when found in an indictment, as it would when found in an act of parliament. Therefore an allegation of the great seal of *Great Britain* must be considered as equivalent to an averment of the great seal of the United Kingdom; and then the evidence proves the allegation, so that there is no variance.

2. It has been the invariable practice, that to impeach a commission, proof must be given of a petitioning creditor's debt subsisting before the prior act of bankruptcy. If a man can become a bankrupt without a subsisting debt to support a commission, all the bankrupt laws are at an end; and therefore it is not true, as asserted, that at the trial a prior act of bankruptcy was proved: because no evidence was produced of a debt prior to the bankrupt's first departure from home. It is decided by the cases of *Mercer* v. *Wise*, 3 *Esp. N. P.* 216. and *Parker* v. *Manning*, referred to in *Doe* v. *Boulcot*, 2 *Esp.* 597., that it is not competent for the bankrupt to impeach his commission by proof of a former act of bankruptcy. No such evidence probably existed here, for the whole transaction appears to have been fraudulent: the docket was struck by the attorney of the bankrupt, in pursuance of instructions given him by a boy, who was the bankrupt's clerk and nephew.

3. As to the third point, there might be some weight in the argument used, if the prosecutors, at the trial of this indictment, had relied on the proof of the mere act of the commissioners, as conclusive evidence of the act of bankruptcy. But evidence of the prisoner's being a bankrupt was produced at the trial, precisely in the same manner as if no proceedings had been had before the commissioners. Even if they had received the testimony of

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of an inadmissible witness; the Court could not call for a disclosure of the evidence on which their judgment was founded, and review the propriety of their decision; because the bankruptcy was a fact, which the commissioners had competent authority to determine; and the Court in so doing would exercise an appellate jurisdiction in matters of bankrupt, which it does not possess. It was proved that the commissioners declared the prisoner a bankrupt. It must be assumed that they attained that conclusion by correct means; and it is proved by other evidence that what they determined was true.

4. No stamp whatever is necessary for a commission of bankrupt; the st. 44 G. 3. c. 98. repeals all stamps that were in force on the 10th *October* 1804, and it imposes no new stamp on this instrument. For it cannot be included under the words "writ, mandate, or process that "shall pass the seals of any Court at *Westminster* or the "Court of Chancery," &c. Where the great seal is not expressly mentioned, it cannot be deemed to be comprehended under general words with seals of inferior dignity.

Holroyd in reply. The language used in statutes would in many instances be insufficient in pleading; many acts, adopting the common parlance, speak of the first lord of the treasury and admiralty, and the lords of the treasury and admiralty; but it would not be sufficient in pleading so to denominate the lords commissioners of the treasury or admiralty.

2. The docket was material in this case, for the purpose of preventing the consequence of law that would otherwise attach by virtue of 46 G. 3. c. 135. s. 5. which enacts that no commission shall hereafter be avoided by reason of a prior act of bankruptcy, unless the petitioning creditor had notice thereof; because, by s. 3. striking

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a docket is made notice. Where notice is given the law is left as before. The only two cases in which it has been held that it is incompetent to the bankrupt to impeach his commission by proof of a prior act of bankruptcy, were decided at *nisi prius*. The Court will determine whether it will follow them, or adhere to the authority of the older cases.

3. It is essential to shew that the commissioners duly declared the prisoner a bankrupt; for if they acted illegally, he had a right to rely on the incompetence of the witness, to consider the commissioners as trespassers, and to retain his goods as against all deriving title under that commission. If he was not duly declared, he was not so declared that the statute sentences him to die for concealing his effects.

4. The stat. 44 G. 3. c. 98. does not affect the argument: for the commission is not marked with the 5*s.* stamp imposed by that act on "writs, mandates, and "process under the seal of the Court of Chancery."

Cur. adv. vult (a.)

(*a*) No judgment was publicly given on this case: but it was understood that the Court unanimously agreed that they saw no reason to be dissatisfied with the sentence which had been pronounced.

Feb. 5, 1808.

A person attainted of felony cannot be heard by petition to the Chancellor to supersede a commission of bankrupt issued against him,

Whether his attainder directly arose out of the commission of bankrupt, or is wholly irrelevant to it.

A bankrupt cannot be permitted to set up a prior secret act of bankruptcy to impeach his commission either at law or in equity.

THE prisoner afterwards exhibited a petition to the Lord Chancellor, stating the facts above detailed, and also stating that on the 10th of *July* 1806, when he absented himself from his dwelling-house, he was indebted to *Hudson Atkinson*, *G. Medley* one of his assignees, and *F.* and *T. Wilde*, in the amount of 100*l.* each, and that

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on the 30th *July* 1806, *Hudson Atkinson* struck a docket against him; and praying that the commission might be superseded. This petition was supported by an affidavit of the facts, made by one *Wallis* a clerk of the bankrupt, and opposed upon the affidavits of the solicitor to the commission, and *Cowell* an assignee, which stated that the bankrupt's clerks and servants had kept out of the way, so that they could not be had to prove the act of bankruptcy before the commissioners; that upon the trial, when the prisoner would have called *Wallis* his clerk to prove the prior act of bankruptcy, the Court refused to hear the evidence without first having proof of a prior petitioning creditor's debt; that *Wallis*, who now swore to such debt, and also *T. Wilde* and *G. Medley*, were in court, and were examined as witnesses, but notwithstanding the intimation given by the Court, they offered no evidence of any prior debt. They also stated, that *Atkinson* was a minor; that the docket was struck upon his instructions by the bankrupt's own solicitor, upon an alleged debt of 100*l.* for money lent by *Atkinson* to the bankrupt; that no entry could be found in any of the bankrupt's books of the supposed loan; that *Atkinson* absented himself at the time of the trial, and could not be found to give evidence, and expressed the deponents belief that the whole transaction of the docket was fraudulent. *Atkinson* made no affidavit upon this occasion. The petition on this day came on to be heard before

The Lord Chancellor.

A preliminary objection was taken on behalf of the prosecution, that the petitioner was attainted, and therefore could not be heard by the Court.

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The Solicitor-General, Hart, and *Bell*, for the prisoner. In examining the first objection, it must for the present be assumed that all the allegations of the petition are proved; for the position, that the attainder prevents the Court from entertaining this petition, goes the whole length of saying, that if the bankrupt had produced the most indisputable testimony that he never had been a trader, that he never had been indebted, the Court would equally be precluded from looking into the circumstances. The present case may be argued with some analogy to proceedings at common law to reverse an attainder. It is admitted as a general rule, that a person attainted cannot be heard in a court of law: that is, he cannot sue for a right. But he is entitled to be heard, while he states his case for the purpose of reversing his attainder. The petitioner does not ask permission to sue for any civil right, but to say his conviction itself is erroneous; and it is not competent for the prosecutors to object to his prayer the existence of the very attainder which it is the aim of the petition to reverse. *Non admittitur exceptio ejusdem rei cujus petitur dissolutio*. *Bacon's Elem.* 7. *F. N. B.* 236. c. *Supersedeas*. If a man be attainted on the statute of provisors, for suing a citation from *Rome*, yet he may have a *supersedeas*. So *Co. Litt.* 128. *a.* "In a writ of error to reverse an utlary, "utlary in that suit, or at any stranger's suit, shall not dis-"able the Plaintife; because if he in that action "should be disabled, if he were outlawed at several "men's suits, he should never reverse any of them." This court, so newly constituted as to its jurisdiction over bankruptcy, must follow the maxims and course of the more antient courts. It may consider itself as now exercising that part of its jurisdiction in which it holds cognizance of original writs, and may at the same time call in aid the statutes relating to bankrupts. If an ori-

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ginal writ had issued under circumstances which made it palpably erroneous, as if through inadvertence it had been sued out contrary to a statute, and proceedings had been thereupon had even to outlawry or attainder, though the consequence would be that all the subsequent proceedings would fall to the ground with it, yet the Court would not on that account hesitate, instantly to supersede the writ. This commission is *quasi* an original writ. It may be objected that the prisoner does not bring himself within the excepted case, in which attainted persons may be heard; for that the superseding of the commission of bankrupt, which is the object of the petition, will not reverse the attainder. It is true it will not directly reverse the judgment below, but it will give the prisoner a strong claim on the mercy of the throne, and therefore by reason of the analogy, the Court will in its discretion entertain this petition. In *Co. Dig Abatement*, E. 3. it is held, that where the cause of action is forfeited by the attainder, the attainder may be pleaded in bar; otherwise it is only a plea in abatement. By the stat. 5 G. 3. c. 30. in the case of a felony committed against that act, the forfeiture to the crown, attendant on every other conviction of felony, is prevented from attaching upon that property, the present distribution of which it is the object of this petition to impeach. This must therefore be considered as a case of that class, in which the attainder does not create a forfeiture of the cause of action, and in which the attainder could not at law be pleaded in bar, but only in abatement. But this Court, sitting here to supersede original writs, knows no such defence as a plea in abatement: therefore the attainder does not preclude the prisoner from being heard here to pray for a different distribution of those effects. Assuming then, as proved, that the attainder does not preclude the bankrupt from being heard, the next proposition is, that it neither was, in the Court below, nor is it here, incompe-

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tent for the bankrupt to impeach the commission upon the facts now stated in the affidavits. [*Lord Chancellor.* I am not aware of any case, in which it has been held at law, that a bankrupt may set up his own prior secret act of bankruptcy to avoid a subsequent commission, or to defeat an action. Several of the Judges have told me it cannot be permitted.] As soon as a man has committed an act of bankruptcy, however secret, he ceases to possess any property. All belongs from that moment to his creditors. Therefore at the time of committing a second act of bankruptcy, he has no property against which a commission can issue. If a commission issues, and there is no property to be divided under it, a *supersedeas* goes, *quia improvidè emanavit.* There is no reason why, for the purpose of shewing the invalidity of the commission, the bankrupt may not be considered at least equally indifferent and free from interest, as if he stood in the relation of creditor. It cannot signify whether the improvidence of the commission is discovered to the great seal through the means of the bankrupt himself, or of a creditor. If in consequence of a former act of bankruptcy, there was no property to be divided under the commission of 1806, it would be a singular effect of the law, that the bankrupt is to suffer death for secreting his effects from a class of creditors, who, as it is now clearly known, would have no right to participate in those effects, if he had not secreted them. The Court has a full discretion in superseding commissions: it may either hear the evidence in behalf of and against a bankrupt's petition, and decide thereupon, or send him to bring an action at law. If the bankrupt is so pressed by the consequences of the commission, that if put to his action at law, he would suffer grievous inconveniences, the Court will at once supersede the commission. In this case the bankrupt cannot sue at law.

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As to the second point, since two of the assignees, *Cowell* and *Medley*, have made affidavits, but have left the bankrupt's statement wholly uncontradicted, they must be considered as admitting the truth of the facts. But it is urged, that the bankrupt's omission to prove the former petitioning creditor's debt at the trial is such laches in him, that he cannot now be heard to prove it. The humane spirit of the *English* law surely will not suffer laches to prejudice a man standing upon his life and death. The only objection which remains, then, is the imputation that the docket struck by *Atkinson* was struck unfairly, to persuade the prisoner's creditors to execute a letter of licence. But even if this were so, yet no creditor whose debt did not accrue before the first act of bankruptcy, could prove his debt under a commission issued thereupon. And all the creditors whose debts accrued previously to the first act of bankruptcy, have a right to take the benefit of it, and to secure for themselves the whole of the bankrupt's property. By the 46 G. 3. c. 135. s. 3. it is provided that striking a docket shall be in all events, if there were any act of bankruptcy whatever, (not that only on which the docket was struck, however irrelevant might be the act of bankruptcy proved, however invalid the docket, however bad the character of the petitioning creditor's,) notice of a prior act of bankruptcy. The policy of that clause may be doubted. The docket was struck eight days after this act received the royal assent, but before it was printed; and it would be a great stretch of imagination to suppose it was struck in contemplation of the effect of this statute, and with a fraudulent view to defeat any subsequent commission. The usual purpose of striking a docket is to indicate an intention of taking out a commission, not to prevent creditors whose debts might be subsequently incurred from sharing the fund with the others. But it is to be feared that this mischief will in

 future

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future often rise from the 3d section. Here a prior act of bankruptcy had really been committed: the petitioning creditors had the constructive notice of it which is created by this clause; consequently the new law does not attach upon the present case; but it must be considered upon the law, such as it before stood; which was, that a secret act of bankruptcy, a private transaction, was deemed notorious to all the world. An additional reason for superseding this commission may be drawn from the latter part of the first section of 5 G. 2. c. 30., which distributes "such felon's goods among the creditors seeking relief under such commission." The consequence of this attainder will be, that the property of the bankrupt will be divided among a class of creditors not entitled to it. In a suit in equity this Court will take notice of certain things for the benefit of persons who are not parties to the proceedings, and will protect their rights. [*Lord Chancellor.* We know that a prior act of bankruptcy, set up in a court of law, will not now avail, unless a petitioning creditor's debt be shewn to exist prior to the act of bankruptcy; but it is not required to be shewn that the creditor ever meant to take out a commission upon that debt: the law at present is somewhat anomalous in this respect.]

Leach, *Cullen*, and *Bolland*, against the petition. The attainder has put the bankrupt out of the protection of the law, and while it stands he cannot be heard. Lord *Bacon's* maxim, "*Exceptio non admittitur ejusdem rei cujus petitur dissolutio*," is not applicable in this case; because this petition is not a proceeding to reverse the attainder. [*Lord Chancellor.* Certainly my superseding the commission cannot reverse the attainder at law.] Very little is found in the books on the subject of attainder. *Blackstone*, J. has said that an attainted person is completely out of the protection of the law, 4 *Com.* 380. The case cited

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cited from *Fitzherbert*, where a person was put out of the protection of the law under the statute of provisors, is not applicable; for that is part of his punishment: so, outlawry is a part of the punishment: and the person labouring under these disabilities is entitled to try whether his punishment is legally inflicted. But the attainder in this case is no part of the prisoner's punishment; it is a legal effect of the judgment pronounced against him. This case must be considered in the same manner as if the prisoner had committed a robbery, or any other felony, and at the same time had been desirous to supersede his commission. It is clear that he could not have been heard for that purpose. The Court is not, as was asserted, now sitting in conusance of original writs; it has no jurisdiction to issue original writs in any criminal case; consequently it can have none to review them. The Court is requested to sit here, in order to furnish evidence for a case, upon which the prisoner may petition the Crown for a writ of error to reverse the attainder. It will not accede to that request: for in the humanity which occasioned the opinion of the Judges to be taken on the case, the bankrupt has had all the benefit which he could hope to derive from a writ of error. To entertain this petition would be to grant a new trial in a criminal case, a proceeding unknown to the law of *England*. Pleas in disability of the person are familiar to courts of equity as well as of law, though the term "abatement" may not be in use here. The argument drawn from the 5 G. 2. *c.* 30. supposes, that the goods of which the statute deprives the crown, would otherwise have accrued to the crown from the bankrupt himself, not from the creditors: whereas, without the aid of this act, they would have become the property of the creditors by the act of bankruptcy, at a period long antecedent to the title of the crown, which could accrue only by the subsequent conviction and attainder. If the prisoner had

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had proved upon his trial the case which he now discloses, still he must have been convicted; for he would still have been guilty of felony. It does not follow even if the commission was invalid, that it imposed no obligation on the bankrupt: on the contrary, a bankrupt must, at all events, surrender, and appear, and substantially conform to his commission. If it were otherwise, the consequence would be, that a bankrupt might reserve a secret act of bankruptcy to defeat the claims of all creditors under any commission founded on a later act of bankruptcy, a privilege which would discharge all the obligations of the bankrupt laws. In 11 *Ves.* 409. *Ex parte Jones,* the Court refused to receive a petition for superseding a commission, though admitted to be groundless, until the party had surrendered; and said, "he has committed a felony." In the case *Ex parte Tomkinson,* 10 *Ves.* 106., where the bankrupt was committed for not giving satisfactory answers to the commissioners, the Court doubted whether it had power to discharge him upon petition, though with the consent of his assignees; and put him to his writ of *habeas corpus.* In *Mercer* v. *Wise,* 3 *Esp. N. P. Cas.* 216. it was not lightly said by Lord *Kenyon,* "the bankrupt would have committed a felony, if he had not surrendered." So, in this case, a felony has been committed, whether the commission is invalid or not. It is not competent for the bankrupt to oppose to the validity of this commission the prior act of bankruptcy. Lord *Kenyon* so decided in *Mercer* v. *Wise.* The intention of the 46 G. 3. was to diminish the effect of secret acts of bankruptcy: the interpretation contended for would give it a greater extent than before prevailed. Before this act only a petitioning creditor's debt and an act of bankruptcy were necessary in order to impeach a commission: the intention of this statute was to require something more for this purpose, notice either express or implied; and it is argued, contrary to the

spirit

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spirit of the act, upon the words "although it shall be afterwards superseded," that an invalid commission, or a fraudulent docket, (for such upon the evidence this must be considered,) is notice for this purpose, equally as much as if it were legal. *Le Blanc* J. held that the construction contended for by the prisoner, would defeat the act; and that it must be a docket struck for the purpose of supporting a commission. It appears reasonable to restrict this effect to a legal commission and legal docket, if the words of the act do not imperatively suggest a different construction. [*Lord Chancellor*. A docket may be irregularly struck, with a *bonâ fide* intention to sue out a commission upon a real act of bankruptcy.] Another ground taken below was that a prior docket had been struck, and that two commissions of bankruptcy could not exist at the same time, and cases were cited in which this has been decided; but all these cases went back to an earlier period than the origin of the most important part of the bankrupt code, the 5 G. 2. *c.* 30.: so that the Court is now, for the first time since the passing of that act, called upon to decide this point, and to entertain, while sitting on bankrupts, an appeal from the judgment of the commissioners of oyer and terminer and general goal delivery. In such as case a this, if the Court could at all interfere, it would only direct an issue at law to try whether the prisoner was a bankrupt or not, and whether there was or was not a good petitioning creditor's debt: these questions were directly put in issue by the trial below, though in a criminal jurisdiction; and the bankrupt has been aided by all the astuteness of the Judges in favour of life. The counsel for the prosecution also dwelt on the fact of the docket being struck immediately after the passing of the act, and on the other circumstances above stated, as strongly indicative of fraud; and observed that it did not lie within the knowledge of the assignees to admit or deny the debt sworn to

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to be due to *Wilde*, and that *Medley* having proved debts under this commission, could not prove them under another.

The Solicitor-General in reply. In this case the attainder never could be reversed by writ of error, because there is no error apparent on the record. No more proper proceeding could have been devised than a judicial discussion before the Lord Chancellor, part of whose most solemn duty it is to inform his Majesty on the propriety of signing death warrants. As to the argument that this remedy is not competent to the prisoner, there can be no doubt that the facts proved would enable a creditor to supersede the commission: they will enable *Medley* to do it: he may permit this commission to stand till after the execution of the prisoner, and then may sue out another, by which he may appropriate the whole fund to himself in exclusion of the latter creditors. In the case of *Ryland* the engraver, it is said that a commission issued after his attainder. [The *Lord Chancellor* referred to *Macdonald* v. *Ramsey, Foster* 61.] The Court below did not hold it indispensable that the docket must be struck for the purpose of taking out a commission, and they considered perhaps that this docket was not so struck; but the prisoner's evidence on the trial was considered principally to fail in this particular, that there was then no proof of a prior petitioning creditor's debt. It is an undoubted fact that a docket was struck, either for the purpose of suing out a commission, or to prevent others from suing it out. What might be the effect of a case where it was expressly proved that the docket was struck for the fraudulent purpose of preventing subsequent creditors from proving, is uncertain: but it seems that according to the act such a docket would preclude them. However, that purpose is not proved here; and the docket takes the case out of 46 G. 3. c. 135. *Mer-*

cer

cer and *Wise* is not an authority to shew that a bankrupt is estopped, for in that case the Defendant was permitted to attempt to prove the prior act, but failed in it, and the Plaintiff had a verdict. No assignees will act under the present commission, for they may at all events, and especially with the notice of the facts which they now have, be called upon to repay out of their own pockets all the money they may distribute: the commission ought to be superseded; and nothing precludes, that it may be superseded on the application of the bankrupt himself.

The Lord CHANCELLOR. If this petition had been presented to me in an earlier stage of these proceedings, or if I had not been called upon by the importance of the case to consider it a good deal before it was argued at the bar, I could not give judgment now. I have a very clear opinion on this case. The present question, in my opinion, is not, what, if it should happen to be my painful duty to advise the sovereign upon the fate of this man, I would advise, but what I can lawfully do, sitting here as Chancellor. When the petition was presented, I thought it extremely difficult to advise that he could be heard here for the immediate object of his petition. It is well observed by Mr. *Bolland* that the effect is the same as if it were another felony. The proceeding in which an attainted person or his heir can be heard, is for the direct purpose of reversing an attainder: but I do not think it fit, that the Chancellor, sitting on bankrupts, is here to take his information for the King's conscience, which he is to communicate in another capacity. The preliminary objection has not therefore been answered. If the bankrupt had come hither before attainder to supersede his commission, I could not have permitted him to do it, but by means, which I know not how to direct under his attainder. I know that many persons now living, whose opinions

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opinions I respect, would hold it was not competent for the bankrupt to avail himself of his prior act of bankruptcy. But here has been a trial on the validity of the commission, a trial of the most solemn species, the most interesting to the bankrupt; and in that trial the goodness of the commission has been decided. I will not say, that proviso in the 46th G. 3. might not better have been left out. I apprehend the practice is, that though you may set up another act of bankruptcy, you cannot set it up, without also proving another petitioning creditor's debt: and that is here more especially necessary to be insisted on, where the other creditor is a minor who could not give the accustomed bond. I will not say whether that docket was, or was not, struck with a view of suing out a commission. If the bankrupt can set up a secret act of bankruptcy, it would lead to this: he may go on, concealing his effects, even to the time of obtaining his certificate, if the creditors do not discover his concealment; and if they detect him, he has nothing to do, but to make mention of that prior act of bankruptcy to shield himself from all prosecution. There are many hardships at present attendant on bankrupts; but if this were law, there would be a much greater one attendant on creditors. I am of opinion I cannot relieve the bankrupt in this mode of proceeding.

Petition dismissed (a.)

(a) The prisoner was afterwards pardoned upon condition of being transported for life.

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The KING v. GILLSON.

Dec. 1.

Upon an indictment on 43 G. 3. c. 58. s. 1. for feloniously burning a house, with intent to defraud the insurers, an unstamped memorandum indorsed on a stamped policy effected by deed, is not admissible in evidence against the prisoner.

THE prisoner was tried on the 21st of *September* 1807 at the *Old Bailey*, before *Heath* J., upon an indictment framed in pursuance of stat. 43 G. 3. *c.* 58. *s.* 1. for having "feloniously, wilfully, maliciously, and unlawfully set fire to a certain house, being in the possession of him the said *E. Gillson*, with intent thereby to injure and defraud the *London* Assurance of houses and goods from fire." The prosecutors proved the execution of a policy by deed under seal, dated the 19th of *May* 1806, whereby, after reciting the payment by the prisoner of a year's premium, the *London* Assurance Company insured the prisoner to the amount of 620*l.* on household goods, &c. in his dwelling-house called the *Golden Shears*, No. 85. *Wood-street*, against any loss or damage which should happen to the said goods, *in the building aforesaid*, by fire on or before the 24th day of *June* 1807, and covenanted to continue libale upon the same risk so long as the assured should pay the said sum of 14*s.* 6*d.* before the 24th of *June* in each succeeding year, and the said corporation should agree to accept the same. Upon this policy was indorsed a memorandum, dated the 16th of *September* 1806, stating that "the within goods were removed from No. 85. *Wood-street* to No. 13. *Old Boswell Court*, which removal was thereby allowed." This indorsement purported to be signed by two directors, by order of the Court. On the 11th of *June* 1807 the prisoner paid 14*s.* 6*d.* and took a receipt signed by the secretary of the company, which expressed that payment to be made for a year's premium of assurance to the 24th of *June* 1808, "upon the sum of 620*l.* assured by the said policy." It was proved by the secretary of the company that this receipt

was

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was marked with their seal; that the indorsement upon the policy was such as was invariably made by that office on similar occasions; that if a loss had happened, the company would have paid it under such an indorsement: that they considered themselves as much bound by the policy, as it then stood, as they could have been if the prisoner had first effected his insurance after he had begun to reside in *Boswell Court*; and that after the payment and receipt before mentioned, the insurance was in force from *Midsummer* 1807 to *Midsummer* 1808. There was sufficient evidence that the house was in the possession of the prisoner, and that he had set fire to it, and the jury found him guilty upon the count above stated.

Upon the application of *Knapp*, who was of counsel for the prisoner, judgment was suspended until the opinion of the twelve Judges could be taken upon two objections: 1. That the memorandum indorsed on the policy ought to have been stamped with the appropriate stamp, either as a policy, or as an agreement, the want of such a stamp rendering the contract invalid, and being a fraud on the revenue. 2. That the memorandum ought to have been made under the seal of the corporation. The case was argued this day before eleven Judges, (*Rooke absente*,) by

Knapp for the prisoner. He contended that it would be extremely hard if an instrument which would be held void in a civil suit, could be given in evidence against a party in a case affecting his life. It is clear that in case of an accidental fire the assured could not have recovered in an action on this indorsement. The want of a stamp on a parol lease for three years, reduced to writing, is fatal, although the lease would have been good if it had not been reduced to writing. *Phillips* v. *Prosser*, *Bull. N. P.* 269.

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269. In *Whitwell* v. *Dimsdale*, *Peake N. P.* 167. the issue turned on the proof of an act of bankruptcy : an unstamped agreement for an assignment by the bankrupt to his sons of all his effects, was produced, to prove that his affairs were then in a declining situation, but Lord *Kenyon* refused to hear it for any purpose whatever. In *The King* v. *Hawkeswood*, 1 *Leach Cr. Cas.* 293. even upon a question of forgery, Lord *Kenyon* thought the stamp was necessary. [*Lawrence* J. Lord *Kenyon* afterwards, in the case of *Colin Reculist* in the year 1796, 2 *Leach Cr. Cas.* 811. and in other subsequent cases, approved of the decision in *The King* v. *Hawkeswood.*] Duties are imposed by 5 *W.* & *M. c.* 21. *s.* 3. and 9 & 10 *W.* 3. *c.* 25. *s.* 37. upon policies of assurance against fire, and by 5 *W.* & *M. c.* 21. *s.* 11. and 10 *Ann. c.* 19. *s.* 105., perpetuated by 10 *Ann. c.* 26. *s.* 73: " no such matter or thing shall be available in law or equity, or *given in evidence, or admitted in any court,*" unless the duties have been duly paid. The stat. 44 *G.* 3. *c.* 98. *schedule* B. gives, in lieu of the former duties, a new duty of 2*s.* 6*d.* for every hundred pounds of the value of property insured against fire. The reason why the Judges agreed in the cases of *The King* v. *Hawkeswood*, *The King* v. *Reculist*, and *The King* v. *Morton*, 2 *East P. C.* 955. that the unstamped instrument might be given in evidence, was, because the necessity of having a stamp was a mere matter of revenue, and did not alter the nature of the crime ; and because it was unfit that a man should be permitted to avail himself of his own fraud on the revenue, by alleging that there was no stamp upon the instrument which he himself had forged ; but here it is of the very essence of the offence, that there should subsist a legally effective contract, without which it cannot be held that the prisoner acted with intent to defraud the company, because, without a valid instrument, it could not lie within his power to command the accomplishment of his purpose. Nei-

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ther is he the maker of the instrument; he is rather the subject of a fraud practised by the corporation which issues to him this unstamped memorandum as a valid policy.

As to the second point. A corporation cannot bind itself by a mere agreement, it can only contract by deed, and without a contract which could be enforced, the intent to defraud cannot be contemplated.

Pooley, for the prosecution, observed, that after the removal of the goods to *Boswell Court*, the corporation had undertaken by parol to indemnify the assured against a loss of them by fire; that a payment had been made upon the faith of this undertaking, and that this was the usual course of dealing of the corporation; and he contended that the prisoner himself had shewn by his conduct that he considered this as a beneficial contract because it was in proof that he had carefully taken the policy out of the house at the time of the fire, and had delivered it to a friend to keep for him. The only question is, whether there is sufficient evidence of an intent to defraud the corporation. It is argued for the prisoner, that in point of law, although a person sets fire to his house with a manifest intention to obtain money from the insurers, yet if upon the instrument of assurance he could not legally compel payment in case of an accidental loss, the arson is no crime. This argument is urged to strengthen as well the objection arising from the want of a stamp, as that which is founded on the defective nature of the instrument. But to examine the latter application of it, for the present putting out of the question the want of stamps, let the case be put, that a person assured having secretly set fire to his own house, sues the insurers on the policy, and that on the plea of *non est factum*, the Defendants establish by evidence that the name of one of the parties was affixed to the instrument

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ment by attorney, under a forged deed of procuration. This would shew there was no valid contract upon which the Plaintiff could compel payment: but could the *quo animo* of setting fire to the house be doubtful, after the Plaintiff had brought such an action? It is not averred in the indictment that the goods were insured; therefore the policy was not produced as evidence to prove the insurance, which was the direct object of the instrument. It was produced only for a collateral purpose, namely, to prove the intent. Nothing in the common law prohibits the production of these instruments in any case. It is prohibited only by the revenue acts above enumerated. Subsequent statutes, viz. 12 *Ann. st.* 2. *c.* 9. *s.* 14. 30. G. 2. *c.* 19. *ss.* 1. 5. 5 G. 3. *c.* 35. *ss.* 4. 10. 16 G. 3 *c.* 34. *s.* 5. 37 G. 3. *c.* 90. *ss.* 2, 3, 4. imposed additional duties on policies. The 44 G. 3. *c.* 98. repeals the former duties, and imposes only a duty of 1*s.* on each policy with a further duty *ad valorem:* the 8th section confirms the provisions contained in all former statutes for enforcing payment of the duties. Throughout the whole of these numerous acts the intention of the Legislature in prohibiting these instruments to be given in evidence, unless stamped, has been merely to secure the payment of the duties. The same doctrine then applies here which was recognized in *The King* v. *Reculist,* in which case the Judges determined upon a similar regulation, enacted in the stat. 31 G. 3. *c.* 25. with respect to unstamped bills and notes: that the Legislature had in contemplation only the person who made the instrument, and that the act was intended to hinder that person from enforcing his contract, and thereby deriving a benefit from his omission to pay the duty. The statutes of *William* and of *Anne* confine the prohibition to the person who does the act. The same argument also applies here which is used in *The King* v. *Reculist,* that if the unstamped instrument could not be received for any

 purpose

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purpose whatsoever, it could not be received as evidence in an action to recover the penalty for not using the stamp. The act meant that an unstamped instrument should not be used according to the intention of the parties, as an effective and operative instrument of such sort as it purports to be; to the end that the person defrauding the revenue may be punished by losing his security, and in many cases his debt also. But for other purposes it may be used. The same law which intended that the instrument should be inadmissible where the effect of excluding it would be to punish the party, did not intend that it should be also inadmissible where its exclusion would protect him against the punishment due for some other offence, which was to be proved by the collateral evidence of this paper. Accordingly, for the purpose of punishing offences, unstamped instruments have been uniformly admitted in evidence. In *The King* v. *Hawkeswood*, long before the passing of 31 *G.* 3. *c.* 25. *Baldwyn* contended that the forged bill was mere waste paper and could not be read, but the conviction was held right; and in *The King* v. *Morton*, the Judges all agreed they must be governed by *Hawkeswood's* case. It is not necessary, in order to constitute a forgery, that the instrument should be such as, if genuine, would be available in law. A man may equally be defrauded of a voluntary as of a compulsory payment. In *The King* v. *Reculist*, *Grose* J. said, "the question whether the instrument is "or is not, a promissory note, depends on its tenor, not "on the circumstance of its being stamped or un-"stamped." So, a forgery may be committed of the will of a living person, although a will can have no effect till after the testator's decease. *Rex* v. *Sterling*, 1 *Leach Cr. Cas.* 117. *Rex* v. *Cogan*, 2 *Leach Cr. Cas.* 503. The same principle was recognized in the case of *Japhet Crook*, *Str.* 901. who forged a lease and release containing so defective a description of the premises that nothing

nothing could have passed thereby if the deeds had been authentic. *Cooke* and *Squires* were tried at the *Old Bailey* two sessions since, before the recorder, upon an indictment for larceny of two bills of exchange and a banker's check, the taking of which is made felony by 2 G. 2. c. 25. s. 3. By 31 G. 3. c. 25. s. 4. checks on bankers, in which certain requisites are observed, are exempted from the stamp duty. The bills of exchange were not found on the prisoners, but the check that had been lost with the bills was found on them, the tenor of which omitted to state the place where it was drawn, and which therefore required a stamp. An objection was made to the receiving of this in evidence, but the recorder said, "Though the paper is not a subject of larceny, it is "evidence to go to a jury, that he who had this in his "possession, stole the other things which were lost together with it." So, if gold or notes, which the owner could not otherwise identify, were wrapped up in an unstamped policy, and were stolen, the policy might be given in evidence for the purpose of identifying the gold or notes.

Knapp in reply. In the cases lastly cited, the material only of the policy could be used, as the material of the check was used, for the mere purpose of identifying the property that accompanied it, as a handkerchief or any other wrapper might be. It was not necessary to read the contents of the check for that purpose. But the tenor of it was not, nor could be given in evidence as the contents of an instrument available at law, in which character the prosecutor seeks to give in evidence the instrument in question. Where the words of a statute are general, the Court will not narrow their meaning when they are to be applied *contra reum*. Neither of the acts contains any exception of particular purposes, for which unstamped instruments may be received. The

 37 *Geo.*

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37 *Geo.* 3. *c.* 111. s. 7. enacts, that they shall not be received "in any manner whatever." Neither the admissibility of this evidence, nor the distinction of evidence for a principal, and evidence for a collateral purpose is recognized in any cases to be found in the books except those of forgery, in which the instrument produced has been of the false making of the party accused. The principle must be still restricted to those cases, and as to the prisoner, the point must still be considered as *res integra.*

On the following day judgment was given at the *Old Bailey* that the prisoner should be discharged (*a.*)

(*a*) It was understood that six judges out of the eleven determined that the evidence was not admissible.

EARLY in this term, Mr. Justice *Rooke*, whose health had been for some time declining, was obliged by indisposition to absent himself from the duties of his station. He was never afterwards able to resume them, and he died at his seat at *Lymington* in the course of the *Hilary* Vacation 1808.

Vale!
Qualem neque candidiorem
Terra tulit, neque cui me sit devinctior alter!

CASES

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Hilary Term,

In the Forty-eighth Year of the Reign of GEORGE III.

1808.

HOWARD *qui tam v.* SOWERBY.

Jan. 26.

The Court will not grant permission to compound a penal action in which part of the penalty goes to the king, unless the consent of the crown is previously signified, whether a verdict has passed for the Plaintiff or not.

THIS was a penal action upon the statute for usury.

Bayley Serjt., on behalf of the Plaintiff, moved for leave to compound upon terms. No verdict had passed, and *Lens* Serjt. was instructed to consent on the part of the Defendant.

Per Curiam. The consent of the crown must, nevertheless, be obtained, before the motion can be granted, whether a verdict has passed or not.

Rule refused.

1808.

Jan. 26.

WOOD and Others, Assignees of HUSSEY and Others, *v.* BRADDICK.

An admission made by one of two partners, after the dissolution of the partnership, concerning joint contracts that took place during the partnership, is competent evidence to charge the other partner.

THIS was an action brought to recover from the Defendant the proceeds of certain linens, which the bankrupts, in the year 1796, had consigned for sale in *America*, as the Plaintiffs alleged, to the Defendant jointly with one *Cox*, who was then his partner, but, as the Defendant contended, to *Cox* only. The Defendant pleaded the general issue, and the statute of limitations: at the trial at *Guildhall*, before *Mansfield* C. J. the Plaintiffs produced in evidence a letter from *Cox*, dated the 24th of *June* 1804, stating a balance of 919*l*. to be then due to the bankrupts upon this consignment.

It was in proof that on the 30th of *July* 1802, *Braddick* and *Cox* dissolved their partnership, as from the 17th of *November* 1800.

Cockell and *Lens* Serjts. objected, that this letter being written after the dissolution of the partnership, was not admissible evidence to charge *Braddick*. The Chief Justice overruled the objection, but reserved the point: and the jury being of opinion that the agency was undertaken by *Cox* on the partnership account, found a verdict for the Plaintiff.

Cockell Serjt. now moved for a new trial. He cited a case of *Pethérick* v. *Turner and Another*, tried in *Mich.* term 42 *Geo.* 3. before Lord *Alvanley* C. J. "*Assumpsit* for wages against two Defendants, who had been partners. One of them suffered judgment to go by default: the other pleaded *non assumpsit*. At the trial the Plaintiff proposed to read in evidence the answer, which

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which the first mentioned Defendant had put in to a bill in the Exchequer, filed after the dissolution of the partnership against the same parties: the bill charged collusion, and also charged that the debt for which this action was brought, had not been paid: the answer denied the collusion, but admitted the money had not been paid. Lord *Alvanley* C. J. held that it would have been good evidence against the Defendant who put in the answer, but that being made after the dissolution of the partnership, it could not be received as evidence against the other Defendant, and rejected it." *Cockell* Serjt. inferred from this case, that the evidence given by a partner after the partnership had ceased, is not admissible for the purpose of proving the joint undertaking of himself and his former partner, even though the former existence of their partnership is established by other proof.

MANSFIELD C. J. Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other, in any transaction which has occurred since their separation: but the power of partners with respect to rights created pending the partnership, remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it, that from the moment when it is dissolved, his account of their joint contracts should cease to be evidence? And that those who are to-day as one person in interest, should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were so united?

HEATH J. Is it not a very clear proposition, that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future? With regard to things past, the partnership continues, and always must continue.

Cockell took nothing by his motion.

1808.



Jan. 27.

CLARKE v. CRETICO.

Qu. Whether a consul is privileged from an arrest.

THE Defendant, who was stated to be consul general of the *Sublime Porte* in *London*, being in custody under an arrest, a rule *nisi* was obtained in the last term for his discharge.

Bayley Serjt., in the same term, shewed cause against the rule. He contended, 1st, That in fact the appointment of the Defendant had been expressly revoked. 2dly, That the privilege from arrest did not extend to the office of consul. It is not conferred by any statute: the act of 7 *Ann.* c. 12. speaks only of "ambassadors or "other *public ministers*." But a consul is not a *public minister*. *Vattel, B.* 2. *c.* 2. *s.* 34. It is no part of his office to transact business between the two states. The principal objects of his appointment are to decide controversies among persons of his own nation, and to give them from time to time such advice and information as may be necessary for the direction of their conduct, and for the regulation of their commercial concerns. In *Barbuit's* case, *Cases Temp. Talb.* 281., although there was no decision upon this point, yet the opinion of Lord *Talbot* was against the privilege. To extend the exemption to persons in this situation would be attended with much inconvenience; because they are generally engaged in trade, and are frequently subjects of the country in which their office is exercised. Neither, according to the best authorities, is the person of a consul privileged from arrest by the law of nations. *Wicquefort*, in his treatise entitled *The Ambassador*, *B.* 1. *s.* 5., observes, "that consuls are only merchants, who, notwithstanding their office of judge in the controversies that may arise between those of their own nation, carry on at the

same

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same time their own traffic, and are liable to the justice of the place where they reside, as well in criminal as civil matters; which is altogether inconsistent with the quality of public minister." But, 3dly, this appointment being derived from the late Sultan *Selim*, is determined by the deposition of that monarch. Several months have elapsed since that event; the defendant has continued to reside in this country, and if the privilege, provided it ever existed, be held still to continue, no period can be assigned for its termination.

Best Serjt. *contrà*, denied that the Defendant's appointment had been revoked. 2dly, As to the general question whether a consul was privileged from arrest, he observed, that in the case of *Triquet* v. *Bath*, 3. *Burr.* 1481. Lord *Mansfield* recognizes and confirms the doctrine laid down in *Barbuit's* case by Lord *Talbot*, who "declared his clear opinion that the law of nations in its "full extent was part of the law of *England*." It would be sufficient therefore to shew that by the law of nations, a consul is entitled to this privilege, without enquiring whether he is in the strict sense of the words a public minister. *Vattel, B.* 2. *c.* 2. *s.* 34. in treating the subject, observes, "that the sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary to the proper discharge of his functions, without which the admission of the consul would be nugatory and delusive. His functions require that he should be independant of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violate the law of nations by some enormous crime." With respect to the opinion of *Wicquefort* he has also shewn, (*Ib.*) that the instances to which that writer refers contradict the position which they are cited to establish. It is admitted that in *Barbuit's* case there was no decision against the claim; and the

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the reporter mentions in a note, that "the person was afterwards discharged by the secretary's office satisfying the creditors," so strong was the opinion in favour of the privilege. Though it sometimes happens that a consul is a native of the country in which his office is exercised; the government, if it thinks proper, may refuse to admit a subject to act in that character :—the supposed inconvenience arising from this circumstance may therefore be easily obviated. As to the 3d point, he denied that the Defendant's privilege was affected by the deposition of his sovereign. "A minister, notwithstanding the death of his master, still continues to be the minister of the nation, and as such, is entitled to enjoy all the rights and honours annexed to that character." *Vattel, B.* 4. *c.* 9. *s.* 126. It is his duty to remain in the country to which he has been sent, until the pleasure of his new sovereign be known. "If he be recalled or dismissed, though his functions cease, his rights and privileges do not immediately expire; he retains them till his return to his sovereign, to whom he is to make a report of his mission." *Ib. s.* 125.

MANSFIELD Ch. J. It has not been clearly proved that the Defendant held the office of consul at the time of the arrest. The general question is undoubtedly of importance; but it is not necessary that the Court should come to any determination upon it at present. The office of consul is indeed widely different from that of an ambassador; but still the duties of it cannot be performed by a person in prison. Yet I should have some difficulty in deciding in opposition to *Wicquefort,* who is an authority of great weight, and without any determination upon the question, (for in the case before Lord *Talbot* there was no decision,) that a consul is entitled to this privilege. The words of the statute are "ambassador or other public minister." But a consul is certainly not a public minister.

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minister. Let the case stand over till it shall be ascertained by further evidence whether the appointment of the Defendant has been revoked.

Bayley having now produced an affidavit, by which it appeared that the Defendant had been dismissed from his office in the month of *December* 1806,

The Rule was discharged.

MARSH and Another v. NEWELL.

Jan. 28.

If a Plaintiff deposit a negotiable instrument, on which he is suing, at the same time giving notice of the action, he does not thereby part with his right of action. And if the depositary sues on the same instrument, the Court will not at the instance of the Defendant stay the proceedings in the first action. *Semb.* That the Court would restrain the depositary from suing on the instrument, on the ground that he receiving it with notice of the suit then pending, must be considered as having consented that the first action shall proceed.

BEST Serjt. on a former day had obtained a rule *nisi* to cancel the bail-bond which had been given in this action, and to stay all further proceedings therein, upon affidavits which stated, that the Plaintiff, on the 13th day of *December* last, arrested the Defendant upon a note for 820*l.* drawn by the Defendant, and payable to the Plaintiff or bearer; that the Plaintiff, being indebted to one *Frost*, on the 17th of *December* paid over this note to him; that *Frost* still held it, and was duly entitled to hold it, and that he also had arrested the Defendant upon the same instrument.

Bayley Serjt. now shewed cause on affidavits, which stated, that the Plaintiff had deposited this note with *Frost*, not as a payment in satisfaction *pro tanto*, but merely as a collateral security, and had at the same time informed him of the action which was then pending. He therefore contended that the Plaintiff had not parted

with

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with his right of action, and was entitled to proceed to recover the sum secured by the note.

Best, contrà. The Plaintiff having parted with the note, has lost his right to proceed with the action: but even if this be considered only as a qualified deposit, and that the effect of it is only to suspend the right of action, the Plaintiff is not entitled to hold the bail-bond in the mean time.

The Court at first recommended that the note should be deposited with the prothonotary, and that the first action only should proceed, for the benefit of both Plaintiffs; but *Frost* was not before the Court to accede to this proposal.

Per Curiam. The Plaintiff could not, after having parted with the possession of the note, commence an action on it; but as he accompanied his transfer with notice of the action which was pending, *Frost* could not, after this notice, be permitted to bring a second action against the Defendant; for the circumstances infer his consent that the first action should proceed. The Plaintiff's possession of the bail-bond cannot be hurtful to the Defendant, provided that he is not liable to subsequent arrests.

Rule discharged.

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The KING *v.* The Sheriff of LONDON, in PEACOCK *v.* LEIGH.

Jan. 28.

The Plaintiff must proceed against the sheriff within a reasonable time, and after that is elapsed, he cannot resort to the sheriff, although he had been delayed by listening to proposals for a compromise made by the Defendant.

A Bailable writ having issued at the suit of *Peacock*, returnable in last *Easter* term, the sheriff was, on the 15th of *April*, ruled to return the writ; but he was not served with a rule to bring in the body till the 7th of *November* following, at which time the Defendant having absconded, and the bail below having become bankrupts, no bail to the action were put in, and an attachment issued. *Best* Serjt. had on a former day obtained a rule to set it aside.

Sellon Serjt. now endeavoured to support the attachment upon an affidavit which stated that the Plaintiff had during the whole of *Easter* and *Trinity* terms been amused by the Defendant with offers of compromise, which eventually proved ineffectual; and that in *Easter* term last the bail were solvent; and he contended that the negociation was no reason why the Plaintiff should lose his remedy against the sheriff.

The Court held, that the negociation did not supersede the necessity of proceeding within a reasonable time against the sheriff. If he had been a party to the proposals, the consequence might have been different. No time had been precisely fixed to limit the sheriff's liability, but two terms and a long vacation had in this case elapsed before any proceedings were had; and the present application was much too late.

Rule absolute with Costs (*a*.)

(*a*) Vide *Rex* v. *Sheriff of Surrey*, 7 *Term Rep.* 452.

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Lightly *v.* Clouston.

The master of an apprentice, who has been seduced from his service to work for another person, may waive his action for the tort, and bring an action of *indebitatus assumpsit* for work and labour done by his apprentice, against the person who tortiously employed him.

THIS was an action of *indebitatus assumpsit* "for work "and labour performed for the Defendant at his "request, by one *Thomas Sinclair*, the apprentice of the "Plaintiff legally bound to him by indenture, for a term "of years at the time of the work and labour so per-"formed existing and unexpired, and to the profits "and receipts of whose work and labour the Plaintiff "was, as the master of the said apprentice, by law en-"titled." The Defendant seduced the apprentice from on board the Plaintiff's ship in *Jamaica*, and employed him as a mariner to assist in navigating his own ship from *Port Royal* home. The cause was tried at the sittings after *Trinity* term last before *Mansfield* Ch. J. The jury found a verdict for the Plaintiff, subject to the opinion of the Court on the following objection, namely, that the Plaintiff ought to have declared in a special action on the case, and that *indebitatus assumpsit* would not lie.

Accordingly *Best* Serjt. having on a former day obtained a rule *nisi* for setting aside the verdict and entering a nonsuit,

Shepherd Serjt. now shewed cause. It has been decided that this declaration is good, in the case of *Eades* v. *Vandeput*, 5 *East*, 39. which was an action brought expressly for the wages earned by the Plaintiff's apprentice, who had been improperly impressed, and compelled to serve on board a ship of war; and the Court there held that the Plaintiff might recover. *Barber* v. *Dennis*, 1 *Salk*. 68. The widow of a waterman was held to be entitled to two tickets which had been earned by her apprentice

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apprentice during his service at sea. In *Smith* v. *Hodson*, 4 *Term Rep*. 217. the Court expressly determined, that although trover would have lain for the goods, yet the assignees might affirm the fraudulent contract of the bankrupt, and recover the price as upon a sale made by themselves.

Best Serjt. *contrà*. The case of *Eades* v. *Vandeput*, as it is now stated, cannot be law. An action might perhaps have been maintained in that case to recover the wages in the shape of damages for the tort; but all the work and labour which the apprentice there did, must have been done for the king; since even the services of such servants as are allowed to the captain of a king's ship are wholly gratuitous to him. And if the apprentice worked for the king, that action could not be maintained against the captain. *Macbeath* v. *Haldimand*, 1 *Term Rep*. 172. *Barber* v. *Dennis* was a case of trover, which can furnish no authority for this form of action, and it is of the less weight because one point which is there reported cannot be law, namely, that it is immaterial whether the person who performed the service was legally an apprentice or not. The analogy drawn from that class of cases in which goods have been tortiously taken and sold, and the Plaintiffs have been permitted to waive the trespass, and sue for the proceeds of the sale, as money had and received to their use, is not applicable here. It is of pernicious tendency more largely to extend this form of action, in which the Defendant is not apprised by the declaration of the nature of the claim that is made on him. It is necessary to preserve the distinction between causes of action which arise *ex delicto*, and those which arise *ex contractu*, or there would be no limits to the perversion that would ensue. A cause was tried before *Eyre* C. J. in which the Plaintiff declared in *assumpsit*, that the Defendant undertook not to beat him

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in a voyage to the *East Indies*. *Eyre* Ch. J. held he could not recover.

MANSFIELD C. J. It is difficult upon principle to distinguish this case from those that have arisen on bankruptcies and executions, and in which it has been held that trover may be converted into an action for money had and recieved, to recover the sum produced by the sale of the goods. I should much doubt the case of *Smith* v. *Hodson*, but that I remember a case so long back as the time of Lord Chief Justice *Eyre* in the reign of *George* the second, in which the same thing was held. I should have thought it better for the law to have kept its course: but it has now been long settled, that in cases of sale, if the Plaintiff chuses to sue for the produce of that sale, he may do it: and the practice is benefical to the Defendant, because a jury may give in damages for the tort a much greater sum than the value of the goods. In the present case the Defendant wrongfully acquires the labour of the apprentice : and the master may bring his action for the seduction. But he may also waive his right to recover damages for the tort and may say that he is entitled to the labour of his apprentice, that he is consequently entitled to an equivalent for that labour, which has been bestowed in the service of the Defendant. It is not competent for the Defendant to answer, that he obtained that labour, not by contract with the master, but by wrong ; and that therefore he will not pay for it. This case approaches as nearly as possible to the case where goods are sold, and the money has found its way into the pocket of the Defendant.

HEATH J. So long back as the time of *Charles* the second, it was held that the title to an office, under an adverse possession, might be tried in an action for the fees of the office had and received ; and *Holt* Ch. J. held it clear

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clear law, that if a person goes and receives my rents from my tenants, I may bring my action against him for money had and received. It is for the benefit of the Defendant that this form of action should be allowed to prevail, for it admits of a set-off, and deductions, which could not be allowed in an action framed on the tort.

Rule discharged.

WESTON *v.* EMES.

Jan. 29.

Parole evidence of what passed at the time of effecting a policy is not admissible to restrain the effect of the policy.

THIS was an action on a policy of insurance on goods from *Surinam* to *London*, in ship or ships. At the trial of this cause at the sittings after last *Trinity* term, before *Mansfield* C. J. the Defendant proposed to prove, that at the time of effecting the policy some of the underwriters objected to the risk on ship or ships, because they had already underwritten policies to a large amount on goods by the *Woolton*, which was known to be in the fleet bound from *Surinam* to *London*; whereupon the broker said, "I can bar the *Woolton*, for here "is my letter of orders:" this was a letter in which the Plaintiffs expressed their wish, that "as their ship (the "*Woolton*) could not bring the whole proceeds of her "cargo, and the captain would of course ship produce "upon other ships, their broker should insure for them "3000*l.* on ship or ships, *Surinam* to *Great Britain*." They added, "that they thought they should have a "shipment on board the *Minerva*." *Mansfield* C. J. rejected this evidence. The Defendant after this conversation subscribed the policy *on ship or ships*. The *Woolton* being lost, the Plaintiffs declared the insurance to be on goods by that ship. Verdict for the Plaintiff.

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Vaughan Serjt. having obtained a rule *nisi* for a new trial, on the ground that the broker's evidence ought to have been received,

Shepherd Serjt. now shewed cause. He insisted on the dangerous situation in which a merchant would be placed by the admission of this evidence; for his only knowledge of the terms of the contract of assurance is derived from the policy which is put into his hands: if that, which persuades him he is secure, because it purports to cover his risk, can be explained away by parol testimony, he lies wholly at the mercy of the broker. This is no latent ambiguity, which may be explained by parole evidence; nor is it a misrepresentation, as it would have been if the broker had said "there is no such ship as the "*Woolton* in the fleet." This is a direct contradiction of the contract, just as if a broker effecting by a written instrument a sale of goods at 50*l*. a ton, should whisper to the purchaser that he should have them at 30*l*.

Bayley Serjt., on the same side, was stopped by the Court.

Vaughan Serjt., in support of the rule, contended that parole evidence is sometimes admissible to narrow the effect of a policy, as in the case of *Macdowal* v. *Fraser*, *Dougl.* 260., where an insurance was effected on a ship from *New York* to *Philadelphia*, and it had been falsely represented that she was arrived at the *Delaware*. The effect of this misrepresentation was to narrow the risk to such part of the voyage as lay between the *Delaware* and *Philadelphia*; yet parole evidence of that misrepresentation was admitted. This is a misrepresentation. The words "I bar the *Woolton*," either mean that the Plaintiff had no goods on board the *Woolton*, and would send the goods by the *Minerva*; or else they are an undertaking made

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made by the Plaintiff, who might alike declare on what ship the policy should attach, or on what ship it should not attach, that he would never declare an interest in goods by the *Woolton*. In the case of *Henkle* v. *The Royal Exchange Insurance Company*, 1 *Ves.* 318. Lord *Hardwicke* Ch. acknowledged the principle, that a court of equity would order a policy to be altered in conformity to the intention of the parties, even after a loss. Nay, at law, there is a case which was cited by *Holt* before *Pemberton* C. J., where on an insurance from *Archangel* to the *Downs*, and thence to *Leghorn*, with a parole agreement that the policy should not attach till a certain period, it was held the Plaintiff could not recover in contravention of the parole agreement. 1 *Marshall*, 247.

The Court intimated that the case cited could not be law, as it is there reported; but expressed their opinion that it could not have been so decided, and that there must have been some custom of a particular trade, or some general practice, as a ship warranted to sail with convoy, is entitled, notwithstanding the warranty, to go round to *Portsmouth* without convoy: and after observing that the letter in question clearly would not authorize the broker to except the *Woolton*, they determined that the evidence could not be admitted, without abandoning in the case of policies the rule of evidence which prevails in all other cases; and that it would be of the worst effect if a broker could be permitted to alter a policy by parol accounts of what passed when it was effected. The Court also observed, that Lord *Mansfield* says of misrepresentations, that they must be of a matter collateral to the contract; but that this was part of the contract.

Rule discharged.

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Gardner v. Moses.
Watson v. Moses.

If witnesses are absent, and their return is not immediately expected, the Court will not require of the Plaintiff a peremptory undertaking to proceed to trial, as the condition of discharging an application for judgment as in case of a nonsuit.

BEST Serjt. having obtained rules for judgment as in case of a nonsuit in these causes, in which issue had been joined on the 10th *Feb.* 1807, and the issue entered on the 9th of *Nov.* last, *Shepherd* Serjt. shewed for cause, that the Plaintiff had been compelled, by the absence of material witnesses, to countermand the notice which he had given of trial at the Sittings in *Michaelmas* term. He added, that the Plaintiff had now given notice of trial for the Sittings after *Hilary* term, but was yet fearful that his witnesses might not arrive soon enough to enable him to proceed to trial at that time; for it was sworn that one of them was afflicted with the rheumatism, and deprived of the use of his ancles; and that another was a seafaring man, and had been impressed while he was travelling to *London* for the purpose of attending the trial of the cause; and it was consequently uncertain when either of them might arrive.

Best, contrà, prayed the Court would at least require of the Plaintiff a peremptory undertaking to proceed to trial in the course of the next term, and judgment to be entered as of the present term.

Mansfield C. J. As to the rheumatic man, there can be no peremptory undertaking: as to the seafaring man, if he is come, an undertaking is reasonable; if he is not, the giving the undertaking would be of no avail, except to beget another application to the Court, for the excuse would be admitted.

Rule discharged in both causes, without a peremptory Undertaking.

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Feb. 1.

HOW v. LACY.

If the sheriff omits to take a bail-bond upon the arrest, and afterwards, upon an action being commenced against him for an escape, causes bail to be perfected, the Court will order the allowance of bail to be set aside, that the action may proceed.

THE Defendant being arrested, put in special bail, and gave notice of justification for the first day of *Hilary* term. The bail not being perfected pursuant to notice, the Plaintiff applied to the sheriff for an assignment of the bail-bond, but found that none had been taken; in consequence of which, on the 25th of *January* he sued out a *capias* against the sheriff. On the 26th bail were justified, and the Defendant died on the 27th. *Best* Serjt. having obtained a rule *nisi* for setting aside the allowance of bail, on the authority of *Fuller* v. *Prest*, 7 *Term Rep.* 109. because no bail-bond had been taken,

Clayton Serjt. now shewed cause. He endeavoured to distinguish this from the case cited, because there the bail were not put in within the due time, here they were; and he contended that by excepting, the Plaintiff had admitted there were bail in the office, and had waived his remedy against the sheriff.

Best, *contrà*. The bail not being justified in due time, the case is as if no bail had been put in.

The Court assented to this, and added, that according to the argument, excepting would make the worst bail in the world to be good bail.

Rule absolute.

1808.

Feb. 1.

COVE v. HEATON.

Upon moving to change the venue into a county palatine, it is necessary to undertake not to assign error upon the want of an original.

BAYLEY Serjt., upon shewing cause against a rule *nisi*, obtained on a former day by *Shepherd* Serjt. for changing the venue from *London* to *Chester*, objected that the Defendant had omitted to undertake not to assign error upon the want of an original. This was an action by original, and there is no filazer for a county palatine.

Per Curiam. When the practice of changing the venue to a county palatine was first introduced into this Court, it was usual to give such an undertaking.

Rule discharged.

Shepherd, contrà.

Feb. 1.

THURSTON v. THURSTON.

If the crown and a subject are contending for priority in an execution, the Court will not compel the sheriff to return the writ of *fieri facias*, at his own peril of rightly deciding the law, but, upon application, will enlarge the time for the making his return, till the Court of Exchequer shall have decided the point.

BAYLEY Serjt. on a former day obtained a rule *nisi* to enlarge the time for the sheriff to return a writ of *fieri facias*, upon the ground, that an extent also had issued at the suit of the crown against the Defendant's goods, that the sheriff was not advised which of the two executions was entitled to the priority, and that this point was in a due course of investigation in the Court of Exchequer.

Shepherd Serjt., on shewing cause, contended that the sheriff ought either to return that an extent had issued,

if

if the case was so, or *nulla bona*, or such other return as the circumstances required.

Bayley, *contrà*. The Plaintiff ought, as a matter of course, to apply in the first instance to the Exchequer; for if the sheriff should mistake the law, and in consequence thereof make an incorrect return, and the Plaintiff were to commence an action against him, the Court of Exchequer would cause the action to be transferred thither.

Rule absolute (*a*.)

(*a*) Acc. *Wells* v. *Pickham*, 7 *Term Rep.* 179.

FEIZE *v.* THOMPSON.

Feb. 1.

If the Plaintiff has evidently sustained some damages, and the jury, being unable to ascertain the amount, find a verdict for the Defendant, the Court will permit the Plaintiff to enter a verdict for nominal damages.

A licence from the king to *T. B.* to import in neutrals from an enemy's country, goods being the property of *T. B.*, cannot be assigned, so as to authorise the importation of goods the property of the assignee.

But *quære*, if there is a special property remaining in *T. B.* as general consignee of the cargo, whether the licence is not then sufficient.

THIS was an action brought to recover general average upon a policy on goods, shipped on account of the Plaintiff, from *Amsterdam* to *London*. Upon the trial of this cause at *Guildhall* at the sittings after last *Trinity* term, before *Mansfield* Ch. J., the Plaintiff proved a sum of 600 guilders to have been paid for a boat, which was to be apportioned as general average, but he did not make it sufficiently appear to what amount the adventure insured was liable to contribute.

In order to shew that the voyage, which had its inception from an enemy's country, was not illegal, the Plaintiff produced the king's licence, which permitted "*T. Baker* and sons, on board six neutral ships, the "names of which they were unable to set forth, to im-

"port

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" port without molestation, from any port of *Holland*, " such goods of the sorts therein enumerated, *being the* " *property of the said* Thos. Baker *and sons*, as might be " specified *in their bills of lading*. Provided that any " who should claim the benefit of the licence thereby " granted, should take and have the same, on condition, " that if any question should arise in any of his majesty's " courts of admiralty or elsewhere, whether such person " had in all points conformed thereto, in all cases what- " soever the proof should be on the person using that " licence, or claiming the benefit thereof." And in the margin was written " *Thos. Baker and sons*, licence to " import." *Baker*, who was the ship's broker, proved that licences for all persons on whose behalf he acted, were constantly taken out in his own name agreeably to this form, which was now universally used : that he appropriated the licence produced, to the ship which brought home this cargo, as one of the six which were to be protected by it, and that the Plaintiff repaid his proportion of the fees paid for obtaining it at the secretary of state's office. *Best* Serjt., for the Defendant, objected that this licence did not specify the names of any persons trading under it except of *Baker* and sons, and therefore did not legalize the adventure of the Plaintiff ; and the Chief Justice reserved this point.

The jury being about to pronounce a verdict for the Defendant, because they could not ascertain any given sum to be the proportion due to the Plaintiff, a nonsuit was taken.

Shepherd Serjt. having obtained a rule *nisi* to set aside the nonsuit and enter a verdict for the Plaintiff,

HEATH J. cited a case of trespass, in which *Grose* J. was of counsel, where no evidence being given of the precise amount of the injury sustained, the jury refused to

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to give any damages, and application, the Court ordred a verdict to be entered for the plantiff, with one penny damages.

MANSFIELD Ch. J. If the Court can put themselves in the place of a jury, and say what the damages shall be, which the jury have refused to assess, that case appears to be rightly decided: and we may here follow the precedent which it establishes.

Rule absolute to enter a verdict for the Plaintiff with 6*d.* damages.

Feb. 4.

But *Best* Serjt. having on a subsequent day obtained leave to open the rule again on the objection arising upon the licence, now shewed cause. The voyage being *primâ facie* illegal, it was incumbent on the Plaintiff to prove its legality. It is not disputed that the crown might authorize *Baker* to make choice of persons or ships which should freely trade from any other country to *England*, but the instrument produced is merely a licence to *Baker* for ships carrying his goods. If by virtue of this, he can delegate the permission to others, the trade is carried on by persons whom the crown does not know. It may be wise and politic to grant a licence to one man, and to withhold it from another: the crown have not here trusted *Feize*, but *Baker*. Upon the terms of the proviso contained in the licence, *Feize* must prove, 1st, that the licence is granted to himself by name; 2dly, that the goods are his; and 3dly, that a bill of lading, comprehending the cargo in question, has been transmitted to him. If this is not so, one man with one licence may shelter the importation of all goods whatsoever. This is a legal instrument, and its construction cannot be controuled by any slovenly practice that may prevail in the city of *London*. In *Destis* v. *Parry*, 3 Bos. & Pull. 3. the goods were included in the grand bill of lading indorsed

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dorsed to *Bridge* and *Smith*, and so came within the terms of the licence, which was granted to themselves or their agents, or the bearer of their bills of lading.

Shepherd and *Bayley* Serjts. *contrà*. This is the constant and ordinary mode in which licences are now granted. The doctrine held in *Deflis* v. *Parry* by Lord *Alvanley* strongly applies here. In that case it was the meaning of the licence that *Bridge* and *Smith* should be the principals, but they were not; for though a general bill of lading was sent to them, particular bills of lading were also sent to the respective consignees; and the Plaintiff never was the bearer of a bill of lading that had passed through the hands of *Bridge* and *Smith*, or entitled them to demand possession of the consignment. On account of the uniform practice which prevails, the Court will look beyond the letter of the licence. A benefit results to the country from the importation of these goods; and the object is not so much to authorize the individuals importing, as to sanction the particular species of commodities imported. The validity of this licence is recognized at the custom house, and the goods are there received under it, in the name of *Feize*. However, if the Plaintiff cannot avail himself of this licence, yet as he has acted *bonâ fide*, he is entitled to a return of premium.

Mansfield Ch. J. I have no doubt of the honesty of the transaction, the truth of the broker's testimony, the innocence of the Plaintiff, or the prevalence of the practice; nor that goods to an immense amount are annually imported under such a licence. But to be sure a lawyer, or a man of business, looking at this licence, would say it was nothing less than a licence to *Feize*. The cases of *Furtado* v. *Rogers*, 3 *Bos.* 191. *Lowry* v. *Bourdieu*, *Doug.* 472. and all the cases for ten years past, are conclusive against the return of premium.

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HEATH J. The course at the secretary of state's office has been altered since 1802; before which time the terms of the licences granted were very general; but they now are much confined, whence it appears that some inconvenience has been found in the former practice.

CHAMBRE J. The licence is most explicit notice to those who obtain it, that the proof of their conforming to it lies on them, and that they must conform in every respect. After this can they profess ignorance?

Rule discharged.

Feb. 11.

On a subsequent day *Shepherd* Serjt. moved for a new trial instead of a nonsuit, upon an affidavit of *Baker* the broker, which suggested, that he had, according to the usual practice of trade, himself received a general bill of lading, comprehending the goods in question, but had mislaid it, and that he did not doubt of obtaining a duplicate from *Amsterdam*.

Feb. 12.

The Court seeing that this was merely a question for costs, and being informed that other actions were now depending upon the same question in which the fact of the bill of lading would appear, directed the judgment to be stayed till those causes should be determined, the Plaintiff undertaking to try them as soon as he should obtain the general bill of lading.

Rule enlarged.

1808.



(IN THE EXCHEQUER-CHAMBER.)

Feb. 3.

FRENCH v. COOK. In Error.

A bill may be filed to warrant a judgment after the want of bill has been assigned for error.

THIS was a writ of error brought upon a judgment of the Court of King's Bench obtained by default in *Michaelmas* term 1806: the Plaintiff assigned for special error "that there was no bill filed between the parties in *Michaelmas* term in the said 47th year to warrant the declaration and judgment," and prayed a *certiorari*, which accordingly issued, tested the 6th day of *November* 1808, and the return whereto stated, that "it did not appear "that any bill was filed of record of *Michaelmas* term "in the 47th year aforesaid between the parties." The Defendant joined in error, and averred "that there was "a bill filed between the parties aforesaid in the record "aforesaid, *as of Michaelmas* term in the said 47th year, "to warrant the declaration and judgment aforesaid;" and prayed a *certiorari*, which accordingly issued, tested the 25th of *November* 1808, and whereto the Chief Justice returned, "that a bill was filed of record in the "plea within mentioned, *as of* the aforesaid *Michaelmas* "term in the said 47th year, on the 18th day of *November* in the 48th year of his Majesty's reign."

Holroyd for the Plaintiff in error. It is essential that a bill or original should be previously filed, to warrant the declaration. The Court cannot know whether any bill was filed, but by the returns made to the writs of *certiorari*. By the return to the first, it appears, that at the time of filing the declaration there was no bill at all; and by the return to the second, it appears, that there is now no bill which can warrant the proceedings; for

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it states, that on a day long subsequent to the judgment the bill was filed as of a prior term. Where a bill is filed against an attorney in the vacation, or where the cause of an action which must be brought within a limited time, as for instance, three months, accrues just after the end of a term, the Court of King's Bench, in order that the action may not be defeated, permits a bill to be filed, and entitled on the very day, as of another term, and regards the very day of filing the bill, and not the first day of the term of which it is entitled, as the commencement of the action. *Waghorne* v. *Fields*, 5 *Term Rep.* 173. *Dodsworth* v. *Bowen*, 5 *T. Rep.* 325. Therefore the very day, and not the term of which it is entitled, must in this case also be considered as the time of filing the bill.

Barry for the Defendants in error, was stopped by

The Court. We know there never is an original: there is no reason why a bill should not be filed after judgment as well as an original. The case of *Barrat* v. *Spraggon*, 2 *H. Bl.* 608. is directly in point. *Eyre* C. J. there said, "if there is a bill on the file of that term, "the Court will not enquire how it came there."

Judgment affirmed.

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(IN THE EXCHEQUER-CHAMBER.)

Feb. 3.

DAMAN v. MARRETT. In Error.

The offence prohibited by the *Durham* act, 3 G. 3. c. 15. s. 1., is the voting as a freeman, not having been twelve months admitted, *and not having any other right of voting than that which the character of a freeman confers.* And the offence must be so averred in the declaration.

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench in an action on the stat. 3 G. 3. c. 15. commonly called the *Durham* act. The declaration stated, that the Defendant below "claimed as a freeman of the town (of *Southampton*) to "vote at an election for members to serve in parliament "for the said town; and *claimed a right* to vote at the "said election *as a freeman only*, he the said Defendant "not having been admitted to the freedom of the said "town twelve calendar months before the first day of "that election, and did then and there presume to "give his vote, and did give his vote," as such freeman, &c.

Burrough for the Plaintiff in error. It is not averred in the declaration that the Defendant had *no other right* to vote than as a freeman. It is a well known rule, that in actions on penal statutes the declaration must bring the offence within the enacting clause: when any exception is introduced into the statute by way of subsequent proviso, that need not be met by the declaration, but it is left to the Defendant to bring himself within the exception by his plea. This was decided in *Spieres* v. *Parker*, 1 *Term Rep.* 141. In *Rex* v. *Pratten*, 6 *Term Rep.* 559. the Court held, that as the seventh section, which gives the penalty, refers to the fifth, which contains the exceptions, it was necessary in a conviction upon the seventh section, to repudiate the exceptions contained in the fifth. The rule, *à fortiori*, must apply here; for the qualification of the prohibition is contained

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in the very body of the enacting clause. The offence described in this act is, where a person gives his vote as a freeman only, who possesses no other right of voting. It is no offence against this act, that a man claims, or gives his vote, as a freeman only, if he has another right of voting; for it is not within the mischief of the act, which was the practice of making numerous freemen on the eve of an election, in order to obtain their suffrages.

Dampier, contrà, contended that when a man chuses to vote in the character of a freeman only, he must stand or fall by that claim, and abide by the consequences of his choice. The action is given to a common informer, a by-stander, whose only knowledge of the voter's right is acquired by hearing the claim which the voter makes at the poll, and who can know nothing of the voter's other latent rights or property. It cannot be permitted that the voter shall mislead the informer by his conduct. The averment therefore, that he claimed to vote as a freeman only, must be considered as equivalent to an allegation that his right to vote was as a freeman only. The Plaintiff's proposition is much too large, that nothing would be a defence at *nisi prius,* which is not embraced by some averment on the record: for by that rule it would be no defence to prove the rights of birth, marriage, or servitude, excepted by the proviso in *s.* 2.; since it is admitted that they need not be excluded by the declaration.

Per Curiam. The single question in this case turns on the true construction of the first clause in the act. The Plaintiff objects, that the offence described in that clause is, the act of a person voting in the character of freeman, when he has not been twelve months admitted to his

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freedom, and has no other right of voting than that which his character of freeman confers; and if the objection is well founded, it is clear that the declaration does not bring the Plaintiff within this description. The words of the clause are, "that no person claiming as a "freeman to vote at any election of members to serve "in parliament, where such voter's *right of voting* is as a "freeman only, shall be admitted to give his vote at such "election, unless such person shall have been admitted "to his freedom twelve calendar months." This is the prohibitory part, and the thing prohibited is that, which alone in good sense it could be, the voting of freemen, who have no other right of voting than as freemen. Then follows the enacting clause; "And if any person shall "presume to give his vote as a freeman, *contrary to the* "*true intent and meaning of this act*, he shall for every "such offence forfeit the sum of 100*l*." Upon the true construction of this clause, the definition of the offence appears to be, the voting as a freeman, not having been such for a twelvemonth; and not having any other right to vote; and it must be so averred in the declaration. But it is said that the voter, by claiming to vote in this right, repudiates any other right to vote. This is neither law, nor good sense: a man may have other rights, and yet, either by mistake or for other reasons, may vote upon the claim of this right; and it would be very hard that he should therefore incur this penalty.

Judgment reversed.

1808.

Feb. 4.

DRURY v. DEFONTAINE.

A sale of goods made on a *Sunday*, which is not made in the exercise of the ordinary calling of the vender, or his agent, is not void at common law,

Or by the stat. 29 *Car.* 2, c. 7.

THIS was an action brought to recover the price of a horse. Upon the trial of this cause, before *Mansfield* C. J. at *Guildhall* at the sittings after last *Trinity* term, it appeared that the Plaintiff, who was a banker by trade, had sent his horse to one *Hull*, who kept a commission stable for the sale of horses by auction, for the purpose of being sold. The Defendant came on a *Sunday* to the stable, and after having tried the horse for an hour, requested of *Hull* that he might carry it to shew a Major *Mackenzie*, and that Major *Mackenzie* might try it. *Hull* told him that the price of the horse at the hammer was a hundred guineas; but if the Defendant would bring him back 100*l.* it would suffice. That he must either bring 100*l.*, or return the horse, by two o'clock at the farthest. If the Defendant did not return it by two o'clock, the horse should be his own. The horse not being brought back till eight o'clock, *Hull* refused to receive it, and insisted that the sale was complete at two o'clock. The jury found a verdict for the Plaintiff. *Shepherd* Serjt. having obtained a rule *nisi* to set aside the verdict and enter a nonsuit on two grounds, 1st, That there was a supposed variance, which it is immaterial to mention, as it was overruled by the Court: and, 2dly, That the contract of sale being made on a *Sunday*, was void,

Best Serjt. now shewed cause. Nothing in the law of this country avoids this sale. The stat. 29 *Car.* 2. *c.* 7. *s.* 1. enacts, first, "That no tradesman, artificer, work-"man, labourer, or other person whatsoever, shall do or "exercise any worldly labour, business, or work upon the "Lord's-day." And the case does not come within the

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terms of this prohibition; secondly, "that no person or persons whatsoever shall publicly cry, shew forth, or expose to sale, any wares, merchandizes, goods, or chattels, whatsoever, upon the Lord's-day." The Legislature could not have meant to include under the first branch of the statute the employments mentioned in the second clause, otherwise the second clause would be superfluous; and it is observable that the words in the second part are not, that no person shall *sell*, but that no person shall *publicly cry*, &c. These expressions shew that an act which is not attended with noise and tumult, and likely to disturb the public service of the church, and the devotions of others, such as a sale in a private room or yard, does not come within the prohibition of this statute. It is also manifest that the first section cannot be meant to apply to all sorts of work or business, otherwise there would have been no occasion for the second section relating to drovers and horse-coursers. [*Mansfield* C. J. That section goes further; for it prohibits drovers and horse-coursers, which word means horse dealers, from coming into their inn on a *Sunday*, and imposes a penalty for that offence.] No canon, no opinion to be found in any writers upon ecclesiastical law, treats bargains made on the *Sunday* as illegal. The *Jewish* law prohibited them, but several of the councils have expressly declared that Christians shall not judaize. In *Comyns* v. *Boyer*, *Cro. Eliz.* 495. it was ruled that "a fair holden on a *Sunday* is well enough: for although by the statute 27 *Hen.* 6. *c.* 5. there is a penalty inflicted upon the party that sells on that day, it does not make it to be void." Before the passing of that statute fairs were currently holden on a *Sunday*. [*Mansfield* C. J. That was because fairs were by prescription, and could not be held on any other days than those on which they had been immemorially held; and that is a very singular statute, for it alters the course of a prescription.] In *Mácalley's* case, *Cro. Jac.* 279. in arrest

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arrest made on a *Sunday* before the stat. 29 *Car.* 2. *c.* 7. *s.* 6. was held good. In *Waite* v. *The Hundred of Stoke*, *Cro. Jac.* 496. the legality of travelling on a *Sunday* is recognized, and it is laid down "that an arrest on a "*Sunday*, and other ministerial acts, are good, and that "an original writ, or patent, bearing teste upon the "*Sunday*, are good enough. For the Chancellor may "seal writs or patents upon any day." Yet the granting of a title or an estate is not legalised as a work of necessity or charity. In *Rex* v. *Brotherton*, 1 *Stra.* 702. an indictment at common law, not concluding *contra formam statuti*, for selling meat upon a *Sunday*, was held bad upon demurrer. These cases then shew, that at common law it was lawful to perform on a *Sunday* any act not expressly prohibited. The stat. 1 *Jac.* 1. *c.* 22. *s.* 28., which enacts that "no shoemaker shall shew, to the intent to put to sale upon the *Sunday*, any shoes or boots, upon pain of forfeiture for every pair made, sold, shewed, or put to sale, 3*s.* 4*d.*, and the just and full value of the same," furnishes a further argument to shew that such acts were not illegal at common law. In this case there is also a count for horses bargained and sold; and if it be illegal publicly to sell, yet nothing prohibits any person to contract on a *Sunday* for the sale of goods to be delivered on a subsequent day. Such a contract is neither labour, business, or work, nor is it a "publicly crying, shewing forth, or exposing to sale."

Shepherd and *Bayley* Serjts., *contrà*. This sale is prohibited by the stat. 29 *Car.* 2.; but independently of that statute, it is illegal at common law. Without examining whether a bargain made on a *Sunday* would be valid, which is nevertheless denied, it is sufficient to observe that the Plaintiff's case is, that this is a good sale and delivery on the *Sunday*, and not a bargain and sale. The statutes contain nothing from which it is to be inferred

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ferred that these practices were not illegal at common law, for the acts 3 *Jac.* 1., 3 *Car.* 1. *c.* 2., and 29 *Car.* 2., all impose particular penalties, which might be designed for the better enforcing the common law. The latter statute does not merely forbid public sales, but it also forbids under a penalty the public exposure, and all the means which are likely to lead to a sale, in order the more effectually to prevent the practice. Several statutes seem rather to recognize the illegality of such acts. The preamble of 27 *H.* 7. *c.* 5. speaks with reprobation of the "abominable injuries and offences done to Almighty God, because of fairs and markets upon high and principal feasts, and of the people so specially withdrawing themselves and servants from divine service." The stat. 29 *Car.* 2. is expressed to be made "for the *better* observation of the Lord's-day." The demurrer in *Stra.* 702. was perhaps allowed, because the offence was not laid in indictment to be *ad commune nocumentum*, and such an act done in a corner, might perhaps not be indictable at common law; or the selling of meat might, if considered independently of the statutes, be deemed a work of necessity. The ten *Jewish* statutes are all related by *St. Paul*, *Rom.* xiii. 9, with the addition of an eleventh commandment for charity. Therefore in Christianity as well as in Judaism, the fourth commandment is retained; and that which is an offence against it when committed by a *Jew*, is equally such when committed by a Christian.

But, 2dly, The stat. 29 *Car.* 2. expressly avoids this sale. It is argued that the sale is good because not publicly made, but the word "publicly" is in this statute attached to the words "cry, shew forth, and expose," not to the "exercise of worldly labour, business, or work." If horse-dealing was not the "ordinary calling" of the Plaintiff, yet this is an exercise of *Hull's* ordinary calling, who is a horse-dealer, and that which is illegal in

in him, [illegible] the subject of a legal contract in another, who adopts his act, and identifies himself with the horse-courser. [*Mansfield* Ch. J. By the 2d section, a horse-courser is expressly forbidden to travel or go to his inn on a *Sunday*. He necessarily travels from place to place in the exercise of his calling: if he may not travel, does not the act afford an inference that he may not sell on a *Sunday*?] Part of this transaction was the travelling to and fro with the horse in order to exhibit it for the purpose of sale. That exhibition was an illegal act, and the illegality cannot be diminished by the sale being afterwards effected. No case has been cited, where a contract made on a *Sunday* has been enforced by law.

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Cur. adv. vult.

MANSFIELD Ch. J. now delivered the opinion of the Court.

The bargaining for and selling horses on a *Sunday* is certainly a very indecent thing, and what no religious person would do. But we cannot discover that the law has gone so far as to say that every contract made on a *Sunday* shall be void, although under these penal statutes, if a man in the exercise of his ordinary calling should make a contract on the *Sunday*, that contract would be void. It appears that the horse was not sent to *Hull* for the purpose of private sale, but for the purpose of being sold by auction; for it may be gathered from the evidence that *Hull* keeps a repository for sale by auction. Therefore *Hull* did not sell this horse, properly speaking, as a [illegible]. It is said by Lord *Coke* that the Christian religion is part of the common law, and such a sale certainly is directly contrary to the practice of those religious duties which it was the purpose of the legislature to enforce, as expressed in the preamble of the stat. 29 Car. 2, namely, "that every person what-[illegible] "soever

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"soever shall on the Lord's-day apply themselves to the "observation of the same, by exercising themselves "thereon in the duties of piety and true religion, pub-"licly and privately;" which certainly is not likely to be done by those whose minds are engaged in making bargains and selling horses. Lord *Coke*, 2 *Inst.* 220. cites a *Saxon* law of King *Ethelstan*, the latter part of which is, *Die autem dominico nemo mercaturam facito; id quod si quis egerit, et ipsâ merce, et triginta præterea solidis mulctator;* upon which Lord *Coke* observes, "Here note, "by the way, that no merchandizing should be on the "Lord's-day." But it does not appear that the common law ever considered those contracts as void which were made on a *Sunday*. In *Comyns* v. *Boyer*, the Defendant pleaded a sale in open fair, but in stating the right to hold the fair, he did not except the case of the fair day falling on a *Sunday*, and it was urged that the plea was bad, because a fair held on that day would be illegal, as coming within the statute 27 *H.* 6. *c.* 5. of fairs and markets. The Court determined that the holding a fair on that day would be illegal, but that the contract would not be void. The law is since changed, and if any act is forbidden under a penalty, a contract to do it is now held void. But though that case is not now law, it shews that there was nothing in the common law which would avoid a sale made on the *Sunday*, otherwise this mention of the statute would not have been introduced. The 29 *Car.* 2. is the only statute that can possibly apply here. It enacts that "no person whatsoever shall do or exercise any "worldly labour, business, or work of their ordinary "callings upon the Lord's-day." To bring this case within the act, we must pronounce that either *Drury* or *Hull* worked within their ordinary callings on the *Sunday*. But the sale of horses by private contract was not *Drury's* ordinary calling, nor was it *Hull's*: his calling was

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was that of a horse-auctioneer, and he was not within his ordinary calling in selling this horse by private contract; and therefore, although it is to be lamented, the sale must be held good, and the

Rule discharged.

GILLETT v. MAWMAN.

Feb. 5.

A, being intrusted with goods belonging to B, undertook to get them insured. He afterwards effected an insurance, in his own name, upon property on his premises, but without making any mention of goods *held in trust*. The premises were destroyed by *fire*, and A. received the amount of his insurance, but which fell considerably short of his own loss. The Court held that no part of this money could be considered as received on account of B., and that it could not therefore be set off in an action for work and labour brought by A against B.

Although a workman is, in general, entitled to be paid for his labour where the work is destroyed, without any default of his own, before it is completed or delivered to the employer, yet the law, in this respect, may be controlled by the usage of a particular trade.

THIS cause was tried before *Mansfield* Ch. J. at the sittings after last *Trinity* term at *Guildhall*. The declaration was for work and labour, with the usual counts for money paid, &c. The Defendant pleaded the general issue, and delivered a notice of set-off for money had and received, &c. and also "for 5000*l*. due and payable to the Defendant from the Plaintiff as the insurer of certain goods and chattels, books and papers of the Defendant, insured by the Plaintiff for the Defendant against loss or damage by fire, and which were destroyed by fire whilst they were so insured by the Plaintiff as aforesaid." The Plaintiff was a printer, and the amount of his demand, as proved upon the trial, was 1819*l*. One of the items of his charge was, for printing, on account of the Defendant, a translation of the Travels of *Anacharsis*. The work was nearly completed, when a fire accidentally broke out upon the Plaintiff's premises, and the whole impression was consumed. It was contended on the side of the Defendant that, as the work was not completed, the Plaintiff by the custom of the

trade

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trade was not entitled to be paid for any part of this printing. It was also insisted that the Defendant might deduct, upon the set-off, the value of his paper which had been consumed upon the Plaintiff's premises, and which the Plaintiff was bound to insure, as well by his express undertaking, as by the general custom of the trade. It was proved that the Plaintiff had received 5000*l.* from the *Imperial* insurance office, in consequence of a loss occasioned by this fire. No policy had been executed, but a deposit was paid by the Plaintiff about a month before the accident occurred. There was some evidence offered for the purpose of proving that this deposit had been paid partly on account of *goods in trust*. The jury found a verdict for the Plaintiff, damages 145*l.*, deducting from his whole demand the charge for printing the above work, and the value of the Defendant's paper which had been consumed. They also found that there was no general custom of the trade by which the printer was bound to insure the property of his employer while it remained on his premises, but that the Plaintiff in this instance had rendered himself liable by an express undertaking. The Chief Justice was of opinion that the loss occasioned by the omission on the part of the Plaintiff to effect the insurance could not be made the subject of a set-off, and permission was accordingly given to the Plaintiff to move that the verdict might be increased by the addition of 1105*l.*, the sum which had been deducted upon that account. A rule *nisi* was obtained on a former day, calling on the Defendant to shew cause why the damages found by the jury should not be increased to 1819*l.*, or why a new trial should not be had between the parties. *Vaughan* Serjt., in moving for the rule, observed, that he meant to contend that the Plaintiff was entitled to be paid for the printing, although the whole work was not completed.

Shepherd

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Shepherd and *Lens* Serjts., upon shewing cause, were desired by the Court to confine themselves to the question of the set-off. They observed, that the Plaintiff had undertaken to insure the property of the Defendant. It had been so found by the jury, and an insurance had, in fact, been effected. Considering the evidence in the manner the most favourable for the interests of the Defendant, it would appear that this insurance had been made generally on the property upon the Defendant's premises, and without any particular specification of the articles upon which it was intended that it should attach. A part therefore of this insurance must be considered as made on account of the Defendant,—on account of that property which the Plaintiff had undertaken to insure; and a correspondent proportion of the sum paid by the office would therefore be money had and received to the use of the Defendant. But it was unnecessary to consider the subject in this light; for evidence was given upon the trial to prove that a part of this insurance was made in respect of *trust property*, which would clearly entitle the Defendant to set off the sum received under that head against the Plaintiff's demand.

Vaughan and *Onslow* Serjts., for the Plaintiff, observed, as to the other point, that by the general rule of law the Plaintiff was entitled, under the circumstances of this case, to recover a compensation for his work and labour, although no benefit had been derived from it to the Defendant. They cited the case of *Menetone* v. *Athawes*, 3 *Burr.* 1592. in support of this position. It was true that upon the trial reliance was placed by the Defendant on a supposed custom of the trade; but the evidence given in support of that custom was not sufficient to authorize the jury in finding a verdict contrary to the general law. Upon the question of the set-off they were stopped by the Court.

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Mansfield Ch. J. The evidence, as to the point which has been argued by the counsel for the Defendant, was all upon one side. The custom of the trade was very fully established. It was proved that the printer, by the general usage, was not entitled to be paid for any part of his work until the whole was completed and delivered. This custom is the law of the trade, and, as far as it extends, it controls the general law. As to the set-off, it was proved upon the trial that the Plaintiff's own loss much exceeded the sum which he had recovered from the office. The deposit was made in his name, and, as far as it appeared, in respect of his own property; it was not proved that any part of it was paid for *goods in trust*, or any thing received by the Plaintiff upon that account. There was no evidence then of money had and received to the use of the Defendant. The jury indeed found that the Plaintiff had undertaken to insure. He neglected to fulfil his engagement, in consequence of which the Defendant sustained a considerable loss. But this loss cannot be made the subject of a set-off; the Defendant must seek his remedy by a distinct action.

The other Judges concurring, the rule was made absolute to enter the verdict for 1251*l*., being the amount of the damages found by the jury, increased by the addition of the sum deducted under the set-off, and that part of the rule which had for its object to increase the verdict to 1819*l*.,

Was discharged.

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IVAT *v.* FINCH and Another.

Feb. 6.

Upon an issue between *A.* and *B.*, whether *C.* died possessed of certain property, evidence may be given of declarations made by *C.* that she had assigned the property to *A*

THIS was an action of trespass, tried before Lord *Ellenborough* C. J. at the last assizes for the county of *Cambridge*, for taking three mares, the property of the Plaintiff, and converting them to the use of the Defendants. The Defendants justified under a *heriot custom*, and the only question between the parties was, Whether one *Alice Watson*, the tenant, was possessed of the said mares at the time of her death? It was admitted that they had formerly been her property, but it was contended that sometime before her death she had transferred them, with the rest of her farming stock, to the Plaintiff. For the purpose of proving this transfer, a witness was called to speak to a conversation, in which Mrs. *Watson* had stated that she had retired from business, and given up her farm and stock to her son-in-law, the Plaintiff. The Chief Justice inquired whether these declarations were accompanied by aey act relative to the management of the farm. This being answered in the negative, his Lordship was of opinion that the evidence could not be received. The jury gave their virdict for the Defendants. A rule *nisi* having been obtained on a former day for setting aside the verdict and granting a new trial,

Lens Serjt. upon shewing cause, contended that the evidence was properly rejected. These declarations were not offered as explanatory of any act relative either to this property, or to the business and management of the farm. They were nothing but casual and idle conversation. Evidence of such a description was calculated rather to mislead than inform; and the admission of it

in

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in courts of justice would be attended with the most manifest inconvenience and danger.

Sellon Serjt. *contrà* was stopped by the Court.

MANSFIELD C. J. The evidence ought to have been received; though undoubtedly such declarations would be entitled to a greater or less degree of attention according to the circumstances by which they were accompanied. The admission, supposed to have been made by Mrs. *Watson*, was against her own interest. Had this been an action between Mrs. *Watson* and the present Plaintiff, her acknowledgment that the property belonged to him might clearly have been given in evidence. It ought, therefore, to have been received in the present instance; because the right of the lord of the manor depended upon her title.

Per Curiam, Rule absolute.

Feb. 6.

The Bailiffs, Burgesses, &c. of TEWKESBURY *v.* BRICKNELL.

A party in pleading may prescribe for *less* than he is entitled to claim.

THIS was an action upon the case of selling corn by sample in *Tewkesbury* market, whereby the Plaintiffs were deprived of their toll. The declaration stated that the Plaintiffs were lawfully possessed of a certain market, holden in *Tewkesbury*, for the buying and selling of corn and grain, and, by reason thereof, of right ought to have a reasonable toll of all corn and grain brought into the said market to be sold, and there sold, not being corn or grain sold in that market *by or to any freeman* of the said borough, nor the corn or grain of any other person or persons legally

exempt

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The Bailiffs, &c. of TEWKESBURY v. BRICKNELL.

exempt from the payment of such toll. The cause was tried before *Macdonald* C. B., at the last assizes for the county of *Gloucester*. It appeared in evidence that corn sold *by* a freeman was exempt from the payment of toll, but that this exemption did not extend to corn sold *to* a freeman. It was contended, therefore, on the part of the Defendant, that there was a material variance between the right, as proved by the witnesses, and the prescription stated in the declaration; and the Chief Baron being of that opinion, the Plaintiffs were nonsuited.

Williams Serjt., on a former day, obtained a rule *nisi* for setting aside the nonsuit and granting a new trial. In moving for the rule, he observed, that it was no objection to a party's right to recover that he had prescribed for less than he was entitled to demand. That was the case in the present instance. It appeared that the exception had been stated too extensively, and the prescription, as laid in the declaration, was therefore rendered narrower than the Plaintiffs' right. In the case of *Bushwood* v. *Bond*, *Cro. Eliz.* 722., the Plaintiff prescribed for common for one hundred sheep. The jury found a right for one hundred sheep, and six cows, and the Court held that the Plaintiff had not failed in his prescription. In *Bruges* v. *Searle and Another*, *Carth.* 219. (*a*), which was a prescription for common of pasture for all the Plaintiff's sheep levant and couchant on his tenement in *Edisborough*, the jury returned a special verdict that the Plaintiff had "common, as well for all other cattle levant and couchant on his tenement, as for sheep." It was objected that the verdict did not maintain the prescription; for that a prescription was an entire thing, and could not be divided. But the Court observed, that "the finding by the jury that the Plaintiff had common

(*a*) See also 1 *Show.* 347; 4 *Mod.* 89. S. C.

for

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for other cattle did not falsify his prescription, but might stand well with it." And many other cases might be cited to the same effect (*a*.)

Best Serjt., who appeared on this day for the Plaintiffs, upon being asked by the Court whether the nonsuit could be sustained, observed that a prescription was evidence of a grant, and that, if in the case last cited the prescription had been pleaded as a grant, the variance would have been fatal. There was no reason why it should not be equally so in the present instance. The only difference between the two cases was in the manner of proof. He admitted, however, that he had not been able to find any decision in his favour.

The Court. All the authorities are the other way.

Rule absolute.

(*a*) See *Hinks* v. *Clerk*, 2 *Lev.* 252. *Johnson* v. *Thorowgood*, 1 *Brownl.* 177. *Hob.* 61.

Feb. 6.

CRUTTENDEN *v.* BOURBELL and MARY ANNE his Wife.

The notarial certificate required in the case of a fine acknowledged in a foreign country, must be under *seal*; a defect in this particular cannot be supplied by proof of the hand-writing of the cognizors.

HENRY Count *Bourbell*, and *Mary Anne* his wife, the conusors of this fine, were resident in *France*, and the acknowledgment was taken before commissioners in that country. The affidavit of the due taking and acknowledging the fine purported to be sworn before *Mercher d'Haussey*, who was described as Mayor of the City of *Neufchatel*, in the department of the *Lower Seine*, and it was subscribed with his name. A certificate that the said *Mercher d'Haussey* was Mayor of the City of *Neufchatel*, signed by two persons who stated themselves

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to be "public notaries of the Emperor *Napoleon the Great*, resident in the city of *Neufchâtel* in the empire of *France*," was indorsed on the affidavit; but no notarial *seal* was annexed. An affidavit, sworn in this country, was also produced, for the purpose of verifying the signature of the cognizors. An application had been made to a Judge at Chambers for his *allocatur*; but the certificate not being under *seal*, which was required by the practice of the Court in the case of fines acknowledged abroad, it was refused.

Bayley Serjt. now moved that the fine might pass. He observed that it was not unusual upon the continent for a notary to be without a seal of office. An instance of that kind had recently come before the Court; and in such a case it was impossible to comply with the general rule. [*Mansfield* C. J. Is there any affidavit to satisfy the Court that no public seal is made use of by the notaries at *Neufchatel*?] There is no affidavit of that fact; but it may be presumed; because it is probable that this certificate is in the usual form. In this case also there is an affidavit that the signatures to the acknowledgment are in the hand-writing of the cognizors.

The Court. That will not supply the defect. There is no rule of Court expressly applying to the case of fines levied by persons resident abroad; but the rule relative to recoveries suffered by persons under these circumstances, has always been held to extend to the case of fines. By that rule, (*Hilary* term 14 *Geo.* 3.) it is ordered, that "if the party or parties shall be in *Ireland*, or in any other parts beyond the seas, then the "affidavit or affidavits shall be made by one of the "commissioners who hath taken the acknowledgment "of such warrant or warrants of attorney, and shall

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"be sworn, either before some person duly authorized "to take affidavits in this court, or before some ma-"gistrate of the place where such acknowledgment shall "be taken, having *authority to administer an oath, and* "in the *presence of a public notary;* which notary shall "also certify in writing under his hand and *seal,* as "well the due administering of the said oath, as also "the name, signature, and office of the magistrate ad-"ministering the same." In this case the certificate is not under *seal*; neither is it stated that the notary was present when the oath was taken, or that the mayor of *Neufchatel* had authority to administer an oath. There is also another objection. It appears that one of the cognizors is an alien enemy; he subscribes himself *Henry* Count *Bourbel;* the name and title are *French,* and he is resident in the dominions of *France.*

Bayley Serjt. took nothing by his motion.

Feb.

SPILSBURY *v.* MICKLETHWAITE.

If, at a country court held for the election of knights of the shire, a freeholder interrupt the proceedings, by making a great noise and disturbance, the sheriff may order him to be taken into custody, and carried before a justice of the peace. It is sufficient in a plea of justification, to an action for an assault and false imprisonment, brought against the sheriff under the above circumstances, to state "that the Plaintiff made a great noise and disturbance at the election, and then and there obstructed and molested the Defendant in the execution of his duty," without stating that he *thereby* obstructed and molested him.

If a plea of justification consist of two facts, each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification if one of these facts be found by the jury.

THIS was an action for an assault, battery, and false imprisonment. The Defendant pleaded, 1st, Not guilty; and 2dly, as to all the charges except the battery, "that before, and at the time when, &c. an elec-

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tion was lawfully had at *Lewes* in the county of *Sussex* of two knights of the said county to serve in parliament, as knights of the said county of *Sussex*, at which said election he the Defendant, being then sheriff of the said county of *Sussex*, then and there presided; and because the Plaintiff, at the said time when, &c., at the said election, threatened to assault him the Defendant, and then and there did actually assault him, so being such sheriff, and then and there made a great noise and disturbance at the said election, and then and there obstructed and molested the Defendant, as such sheriff in the execution of his duty at such election, he the said Defendant thereupon at the said time when, &c., charged one *William Mills*, being then and there one of the headboroughs of *Lewes* aforesaid, to take the care and custody of the Plaintiff, in order to carry him before *Thomas Partington* esquire, then and there being one of his Majesty's justices of the peace, assigned, &c. for the said county, in order that the Plaintiff might be dealt with according to law," &c. Replication, *De injuriâ suâ propriâ, &c.* The cause was tried before *Mansfield* Ch. J. at the last assizes for the county of *Sussex*.

The jury found that the Plaintiff, who was a freeholder of the county, did not assault the Defendant as alleged in the plea; but they were of opinion that all the other facts contained in the plea were proved. Upon this, at the recommendation of the Chief Justice, a verdict was taken for the Plaintiff, damages one shilling; and permission was given to the Defendant to move that it might be set aside and a nonsuit entered. Accordingly a rule *nisi* for that purpose having been obtained in *Michaelmas* term,

Best and *Bayley* Serjts. now shewed cause. The assault stated in the plea has been disaffirmed by the jury, although they have found the rest of the facts in favour of

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the Defendant. Admitting however that these facts would, if pleaded by themselves, have amounted to a justification, still the Plaintiff in this case will be entitled to retain his verdict. It is a rule of pleading that two defences cannot be included in the same plea. It is true that a plea may consist of several facts, but they must constitute only one defence. The plea is put in issue, not in parts, but as one entire justification. If a material part be disproved, the whole defence fails; for the jury are to find the substance of the issue, that is, of the whole issue joined between the parties; and in this case the assault, which is the most material fact contained in this plea, has been directly found in the negative. But supposing that the facts which the jury have found had been pleaded by themselves, they would not have amounted to a justification. This is the case of an arrest without a warrant, in order to justify which, the Plaintiff must have been guilty of a breach of the peace, or of some indictable offence; for the authority of the sheriff in this respect is not greater than that of a constable. The offence also should be charged in the plea with as much precision as in an indictment. The Defendant alleges that the Plaintiff obstructed and molested him in the execution of his duty. But it is not stated *how* he obstructed and molested him. In an indictment for obtaining money by false pretences, the false pretences must be particularly set forth upon the record. *Rex* v. *Mason, 2 Term Rep.* 581. It is stated indeed that the Plaintiff made a great noise and disturbance at the election, and then and there obstructed and molested the Defendant, &c.; but it is not alleged that he *thereby* obstructed him. Every plea is to be taken most strongly against the pleader; and in this case the Plaintiff is entitled to avail himself of every objection to the plea, which might have been made upon special demurrer; because the Defendant, by inserting the assault in his

plea,

plea, has deprived the Plaintiff of the opportunity of demurring. The general question is important, since if a contest had taken place, and death had ensued, the question of murder would have depended upon the legality or illegality of the arrest.

Shepherd Serjt. *contrà* was stopped by the Court.

MANSFIELD Ch. J. If a plea of justification to an action of this nature consist of two facts, each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification, if one of these facts be found by the jury. The only question then to be considered is, whether that part of the plea which the jury have affirmed, would alone constitute a defence to the charge to which it is here pleaded. It amounts in substance to this; that, at the time when the trespass was committed, the Defendant was sheriff of the county of *Sussex*, and in that character was presiding at the election of knights of the shire to serve for the county in parliament; that the Plaintiff made a great noise and disturbance at the election, and molested and obstructed him in the execution of his duty, upon which he ordered a constable to take the Plaintiff into custody, and to carry him before a justice of the peace, &c. It is impossible that any person upon reading this part of the plea, can entertain a doubt, whether the sentence, interpreted according to its natural import and construction, sufficiently expresses that the obstruction was by means of the noise. Neither is it easy to conceive how the Plaintiff could have made a great noise and disturbance upon this occasion, without obstructing the Defendant in the discharge of his duty; and as to the nature of the noise itself, that does not admit of particular description. The question then resolves itself into this, whether the conduct of the Plaintiff in making a great

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noise and disturbance at the election, and, by means of that noise and disturbance, obstructing and molesting the sheriff in the execution of his duty, was sufficient to justify the Defendant in the measure which he pursued. I am surprized that this question should be seriously argued. At the time when the trespass was committed, the Defendant was presiding at the county court. He was engaged in the discharge of a most important duty, a part of which consists in the administration of oaths, and in deciding upon the qualifications of the electors. The conduct of the Plaintiff in disturbing the order and proceedings of the court, would have justified the interposition, not only of the sheriff, but of any of the freeholders, who are the judges of that court, or, perhaps, of any other individual; for every man is interested in the due election of representatives to parliament. But it is said that the sheriff has no authority to commit. He certainly has no authority to commit as a magistrate; nor did he in this case commit the Defendant. The extent and nature of the powers appertaining to the office of sheriff are objects entirely foreign from the present inquiry. It is sufficient in this instance to observe that it was the duty of the sheriff to preserve order and decency. The proceedings of the court were interrupted by the turbulent conduct of the Plaintiff; the Defendant was bound by his situation to prevent the continuance of this interruption, and he could not have adopted a better mode for that purpose, than by ordering the Plaintiff to be carried before a magistrate, to give security for his good behaviour. It has been objected that the facts found by the jury do not amount to any offence. Has the law of *England* then been so anxious to preserve the purity and freedom of election, upon which the rights and liberties of the people depend? has it established various forms and regulations for this purpose, and shall it be said that it is no offence to defeat

these

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these provisions, and to render them nugatory and vain? Is it no offence to interrupt the exercise of those powers which have been entrusted with this view to the sheriff; to annul so many legislative provisions; to deprive the country of the benefit of a system so anxiously established; and to attack the most valuable rights and privileges of the people of *England*? What should we say of those laws which we are so much accustomed to extol, if conduct of such a description could be pursued with impunity? This is a question upon which I cannot bring myself to entertain a moment's doubt. The Plaintiff was guilty of a serious offence against public order; he was guilty of a breach of the peace, for which he might have been punished by indictment. His conduct was such as to call for immediate interposition. The Defendant was not only justified in what he did, but it was his duty to adopt means, (and what better could have been chosen?) to prevent the Plaintiff from continuing to interrupt the proceedings of the court.

Rule absolute.

PRENTICE v. REED.

Feb. 9.

Upon a reference at *nisi prius*, an arbitrator cannot award a greater sum than that for which the verdict is taken. But if he awards a greater sum than the amount of the verdict, and judgment is entered for the whole, and it appears that a part of the sum is covered by a countervailing demand which never was a subject of dispute, so that only a balance, less than the amount of the verdict, is ultimately to be paid over, the Court will reduce the judgment to the amount of the verdict, and grant execution for the sum really due.

Where an arbitrator has power to *order what he should think fit to be done* by either of the parties respecting the matters in dispute, *quære* whether he might not direct them to consent to an application to the Court for enlarging the damages given by the verdict?

THE facts of this case were as follow: An unexpired term of years in a farm, and the stock thereon, belonging to one *Asplin*, being taken under a *fieri*

 facias

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facias at the suit of *Steonard* and *Ryland*, and exposed to sale by auction, *Asplin* authorized the auctioneer to sell at the same time all the growing crops, land sown, fallows, and effects which he had on the premises, to be taken at a valuation by the purchaser of the lease, and the lease was sold upon condition that the purchaser should be approved by the landlord. The sum produced by the sale of the lease and a part of the stock, not including a stack of clover hay, which was then on the premises, and the growing crops and fallows, proved sufficient to satisfy this execution. The Plaintiff was declared the purchaser of the lease, he took an assignment of the term from the sheriff, and entered on the farm, exclusive of the growing crops and fallows. After this he applied to the auctioneer to have the crops and other effects valued, but was refused, on the ground that the landlord's consent to the assignment of the lease had not been yet obtained; the landlord shortly after granted him a new lease for the residue of *Asplin's* term, after which, but before the growing crops and effects had been valued or paid for, a *fieri facias* issued against *Asplin's* goods at the suit of one *Vanderzee*, directed to the Defendant, who was then the sheriff of *Essex*, under which the Defendant seized the stack of clover and the crops then growing on the farm, and sold them for 495*l.*, which he received, and before the return of the writ took a second crop of clover, value 100*l.*, which had grown subsequently to the dates of the assignment and new lease, and to the taking of the first growing crops; the Defendant, during his possession, obstructed the Plaintiff in the occupation of his farm, and thereby occasioned him to sustain other losses to the amount of 20*l.* Soon after the Defendant had taken possesion, the growing crops, &c. were valued in pursuance of the conditions of sale, at the sum of 344*l.* 15*s.* 3*d.* The Plaintiff having brought an action of trespass against the Defendant, for taking the goods and crops under the second *fieri*

fieri facias; the cause came on for trial at the *Chelmsford* summer assizes 1806, before *Macdonald* C. B. *Asplin* had before that time commenced an action against the Plaintiff for the value of the crops; and *Vanderzee* being desirous to obtain the fruits of his judgment by getting possession of the sum which *Asplin* might recover from the Plaintiff, and which, if paid over to *Asplin*, could not be taken in execution, the parties, at the particular request of *Vanderzee*, consented to refer the cause, and the terms mentioned in the order of *nisi prius* were as follow:

The Defendant undertaking that an indemnity should be given, to the arbitrator's satisfaction, to save the Plaintiff harmless from the present and any other suit by *Asplin* for the price of the crops and other articles taken under *Vanderzee's* execution, it was ordered that a verdict should be entered for the Plaintiff, damages 500*l.*, *subject to the award* of the arbitrator, who was thereby *empowered to direct that a verdict should be entered for the Plaintiff, or Defendant, as he should think proper,* and also to settle *all matters in difference* between the parties, and to order and determine *what he should think fit to be done by either of them respecting the matters in dispute;* and if he should be of opinion that *Vanderzee* had no right to seize the crops and other articles, *Vanderzee* should notwithstanding be at liberty to retain the amount of the price which the Plaintiff was to have paid to *Asplin* for the same; but the value of them beyond that price, and the damage sustained, if any, was to be paid to the Plaintiff: and by the same order, after reciting that a valuation of the same crops and other articles had been made between *Asplin* and the Plaintiff, the arbitrator was empowered to direct, that in case *Asplin* should recover more from the Plaintiff than the amount of such valuation, the difference should be repaid by the Plaintiff to the Defendant's attorney, out of the money, if any, that should be awarded to the Plaintiff.

The

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The arbitrator made his award, and therein reciting that the Defendant had given to the Plaintiff the indemnity agreed on, and declaring his opinion that the crops and stack of clover did pass to the Plaintiff by the auctioneer's sale, awarded, that the Defendant was indebted to the Plaintiff, for the crops and clover hay, in 495*l.*; for the second crop of clover, in 100*l.*; and for damages occasioned by the obstructions to his occupation, in 20*l.* And that on the whole *there was due and owing from the Defendant to the Plaintiff* 615*l.*, and *that the verdict which had been entered for the Plaintiff for* 500*l. should be altered to* 615*l.* And the arbitrator, further reciting that *Asplin* had as yet recovered no money from the Plaintiff, declared he was unable to direct any specific sum of money to be repaid by the Plaintiff to the Defendant's attorney out of the money awarded to the Plaintiff, but awarded, that if *Asplin* should recover more than the amount of the aforesaid valuation, then the Plaintiff should repay to the Defendant's attorney such difference out of the money thereby awarded to him.

The associate altered the *postea* to 615*l.*, and delivered it to the Plaintiff, who thereupon entered up judgment for the sum of 615*l.* damages.

Vaughan Serjt. had on a former day obtained a rule *nisi* that the judgment might be reduced to the sum of 500*l.*, and that upon payment to the Plaintiff of 155*l.* 4*s.* 9*d.*, being the residue of the said 500*l.*, after deducting the sum of 344*l.* 15*s.* 3*d.*, which, as the rule stated, had already been paid to *Asplin* in pursuance of the said order of *nisi prius* and award, satisfaction might be entered up on the judgment, and the abovementioned bond of indemnity executed by the Defendant might be given up to the Plaintiff to be cancelled.

Shepherd and *Bayley* Serjts. now shewed cause. Although it should be admitted that an arbitrator in general

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ral cannot award a greater sum than the damages found by the verdict, the present case is very distinguishable from that of *Bonner* v. *Charlton*, 5 *East*, 139. where that point was decided. The terms of the submission here clearly shew, that if the Plaintiff, by the direction of the arbitrator, had in terms applied to the Court to enlarge the verdict, unless he sought to receive upon the close of the transaction a greater sum than 500*l.*, the Defendant could not have opposed the motion. The award may be considered as virtually being a direction of the arbitrator to that effect. The intent of the submission was, first to ascertain the whole amount of the injury sustained by the Plaintiff. If it had happened that the Plaintiff had previously paid *Asplin* for the crops he had bought, he would have been entitled to receive the whole of that amount. Next it was intended to ascertain the amount of the money due from the Plaintiff to *Asplin*, who was then suing for the price of the crops, in order that *Vanderzee*, the real Defendant, for *Reed* is only nominally Defendant, might be permitted to retain that sum out of the damages to be recovered against himself, and might be required to pay over to the Plaintiff the residue only; and because there was a growing crop, which was daily increasing in value, and it was thought doubtful whether *Asplin* could not shew his property therein to have continued beyond the time of making the valuation, whereby he would have entitled himself to recover more than 344*l.* 15*s.* 3*d.*, it was agreed, that in order fully to countervail the indemnity given by the Defendant to the Plaintiff, the Defendant should be at liberty to deduct from the whole amount of the damages sustained by the Plaintiff, not the sum of 344*l.* 15*s.* 3*d.* only, but also the excess, if any, by which the damages to be recovered by *Asplin* against the Plaintiff should exceed that valuation. The only sum then which *Vanderzee* was to pay to the Plaintiff, was the excess of the whole value of the crops above the

sum

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sum to be recovered by *Asplin*. He undertakes to sustain the consequences of *Asplin's* action, upon condition that he should be in all events discharged from paying to the Plaintiff a sum of money equal to that which *Asplin* might recover from the crops, and should pay over to the Plaintiff the balance only: from the former sum he was wholly released therefore by a matter paramount to the award, the prior agreement recited by the submission: that sum never was made a subject of dispute between the parties; and it is clear that it ought to form no part of the damages to be recovered in this action, and that consequently it ought never to have been included in the award. If, upon a reference of all matters in difference, the Plaintiff should prove a debt of 1000*l*., and the Defendant should establish a set-off for 600*l*., a verdict for 500*l*. would enable the arbitrator to do complete justice. The whole obscurity in this case arises from the circumstance that the arbitrator has in form awarded 615*l*., when he ought to have awarded 270*l*. 4*s*. 9*d*. only: he has included in the damages the 344*l*. 15*s*. 3*d*., instead of leaving out that sum as he ought to have done. If a verdict had been found in blank, for such sum as the arbitrator should award to be due, it would have been filled up, not with 615*l*., but with 270*l*. 4*s*. 9*d*. only. In *Bonner* v. *Charlton* no facts appeared to discover the ground of the award, but here the Court can distinguish the compotent parts of the sum which the award purports to give, and therefore has the means of rectifying the mistake. If the award and judgment are wrong, they are wrong in form only. The arbitrator has not in effect given more than 500*l*., and the Court will permit the judgment to be amended by altering it from 615*l*. to the sum of 500*l*., for which the verdict was originally given.

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Vaughan Serjt. *contrà*. The question is not whether a good award might have been made, which would have effectuated the intention of the arbitrator without exceeding the limits of the verdict. He clearly might have made his award for the balance; but he has not done it. The question is, whether the arbitrator had authority to enlarge the verdict to 615*l*. Not only is it impossible to sustain that position, but even if the arbitrator had directed an application to the Court for the verdict to be enlarged to 615*l*., the Court would have had no power to grant it: for the verdict is of the finding of the jury, whose exclusive province it is to assess damages. But the verdict is the foundation of all the arbitrator's authority. As he has exceeded then the limits of his authority, the award is bad *in toto*: and the Court will either presently dispose of it according to its legality, or at least will send the case to be re-considered by a jury.

MANSFIELD C. J. I am by no means clear that the arbitrator might not have directed that an application should be made to the Court to enlarge the verdict to 615*l*., and that the Defendant should consent. It is possible that a case may arise, in which the amount of the nominal damages in the verdict on an order of reference may be material, but in most cases it is wholly immaterial, as it is here: the Defendant does not venture to swear that he thought it important to limit his damages to 500*l*. It is urged that this is the finding of the jury, but that is mere form: it is in substance an agreement between the parties. The jury have in fact no concern with the matter. The amount is fixed by the counsel engaged in the cause, who, upon agreeing to refer, usually take a verdict for the damages laid in the declaration; here the Plaintiff has not indeed done that, but he certainly meant to take damages sufficiently large to cover the sum he was entitled to receive which was much less than 500*l*.; and he thought that in taking a verdict

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verdict for that amount, he was secure. It is impossible this should have been any other than a mere mistake. This was not a reference of the cause for the mere purpose of settling the amount of the damages, but it was agreed that the arbitrator might direct a verdict for the Plaintiff or the Defendant: the order also included a reference of all matters in difference, and the submission recites the agreement between the parties that *Vanderzee* should retain the 344*l.* 15*s.* 3*d.*, and that only the value beyond the full price of the crops should be paid to the Plaintiff. It was meant that the verdict should stand as a security for the Plaintiff's receiving the sum, to which he was in justice entitled. If the sum to be paid to *Asplin* had been finally ascestained at the time of the submission, there would have been no difficulty in the case. It was not at that time so ascertained, therefore it could not be deducted in figures: but that makes no difference. I would not overturn the case of *Bonner* v. *Charlton.* If this is an award that the Defendant shall *pay* more than 500*l.*, it is a bad award.

HEATH J. Very special and large powers are here given.

Cur. adv. vult.

MANSFIELD Ch. J. now delivered the opinion of the Court.

After going very fully into the circumstances of the case; he observed, that no affidavit had been made for the purpose of impeaching the award, nor were any of the facts disputed. No complaint was made by the Defendant of any injustice done by the arbitrator, but he complained of the terms of the award, and desired that the judgment might be entered up for 500*l.* only, and that the sum of 344*l.* 15*s.* 3*d.* might be deducted, not from the 615*l.*, but from the 500*l.* That would be

a gross

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a gross fraud; but in point of form the Defendant was right; and therefore the Court directed that the judgment should be altered to the sum of 500*l.* damages only, but that the Plaintiff should be at liberty to sue out execution for 270*l.* 4*s.* 9*d.*, the sum which remained after deducting 344*l.* 15*s.* 3*d.* from 615*l.*

Vaghan observed, that the judgment of the Court did not coincide with the terms of his rule, and elected to have it

Discharged with Costs.

Bayley then moved, on behalf of the Plaintiff, that he might be at liberty to amend his judgment in the terms suggested by the Court, which was granted conditionally upon his filing a proper affidavit of the circumstances.

The KING *v.* The Sheriff of SURRY, In a Cause of BREWER *v.* CLARKE.

Feb. 9.

A *cognovit* conditioned for payment by instalments discharges the sheriff.

THE Defendant's bail having been rejected, the Defendant, on the night when the rule requiring the sheriff to return the body expired, gave to the Plaintiff, without any notice to the sheriff, a *cognovit* for payment of the debts and costs by instalments, with a condition, that upon failure of payment, the Plaintiff might either enter up judgment and sue out execution forthwith, for all the then remaining instalments, or should be at liberty to move for an attachment against the sheriff; it being especially agreed, that such right of moving for an attachment should remain in the Plaintiff, as a security in

case

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case default should be made on the payment of any instalment. These terms were inserted under a belief of the Plaintiff that they would have the effect of keeping the sheriff still liable. The debt and costs not being paid, an attachment was sued out against the sheriff.

Bayley Serjt. having obtained a rule *nisi* for setting aside the attachment,

Best Serjt. now shewed cause. Whatever might be the effect of a *cognovit* coupled with a considerable delay, as two or three months, it has never been held that a mere *cognovit*, without any thing more, was a discharge of the sheriff. The sheriff is in the condition of bail to the action. In *Hodgson* v. *Nugent*, 5 *Term Rep.* 277. it was held that the bail were not discharged by a *cognovit* given without their knowledge. And in an application which was made to this Court in the present term, the Court came to the like decision. If fresh bail had been put in when the former bail were rejected, they might have rendered the Defendant in their own discharge after he had given this *cognovit*.

Mansfield C. J. A *cognovit*, except under particular circumstances, is a discharge of the sheriff. It certainly would be proper to enquire whether it is given with or without his knowledge; but here it is without notice; and the question is, whether in that case it discharges him. The effect of this instrument was, that from the time of giving it, the Defendant could not be taken by the sheriff. If other bail had been put in when the first were rejected, though they might have surrendered the Defendant before giving this *cognovit*, for payment by instalments, they could not do it after; and if they had taken him afterwards, he would have been entitled

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titled to his discharge. The duty of the sheriff is to bring in the body of the Defendant: the Defendant appears in court and acknowledges the debt.

HEATH J. If fresh bail had been put in, and the Defendant had then given a *cognovit* authorizing the Plaintiff to enter up judgment *instanter*, the bail might afterwards have rendered the Defendant. But the security here taken is for a payment by instalments. This is like the case of a bill of exchange: if the holder does not proceed in due time against the acceptor, he discharges the drawer. Here the party elects a different remedy against the Defendant, and thereby absolves the sheriff from his responsibility. So if a receiver takes security from a tenant, he makes himself liable. This *cognovit* is a new modification of the debt, and the Plaintiff, by acquitting the Defendant of the former debt, acquits the sheriff.

CHAMBRE J. Is not this very different from the case of bail? The Defendant is in the costody of his bail, but here you treat him as being present in the court: he appears in court when he gives a *cognovit*, and the sheriff has done his duty: when the Plaintiff has accepted his appearance in court, the sheriff has nothing further to do.

Rule absolute.

Bayey in support of the rule.

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Feb. 10.

Bell v. Gate.

If bail is added to an attorney, and justifies without opposition, the Court will not set aside the allowance of bail.

THE Defendant put in bail, one of whom was his attorney: he then gave notice of adding another person as bail: the Plaintiff excepted, but permitted the bail to justify without opposition. It being discovered that the sheriff had taken no bail-bond,

Best Serjt, on a former day, obtained a rule *nisi* to set aside the allowance of bail, upon the principle that bail, one of whom is an attorney, are a nullity; and that no addition can be made to a nullity: and he cited a case of *Jackson* v. *Hillas*, *Easter* term 45 *Geo* 3., in which he was of counsel for the Defendant. The facts there were, that the Defendant having deferred to put in bail till the last minute which he had for that purpose, one of the proposed bail failed to come; and in order that some bail might be put in within the time required, the attorney's clerk became one of them. The next morning another person was added in his stead. It appeared in that case also, that no bail-bond had been taken. It was there urged in support of a motion to set aside the allowance of bail, that any addition made to a nullity, must be bad. *Best* had on that occasion contended the objection was urged too late, not being made until after the bail had been allowed; but the Court made the rule absolute.

Shepherd Serjt. now shewed cause against the present rule. The Plaintiff in this case having excepted to the bail, with the knowledge that one of them was an attorney, has recognized them as bail. In *Jackson* v. *Hillas* the Plaintiff treated the bail as a nullity, and applied for an assignment of the bail-bond. If the Defendant is not well in court three days after his bail have been allowed,

neither

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neither is he after three weeks; and the Plaintiff may lie by so long, that when the allowance of bail is set aside, and an attachment has issued against the sheriff, if an application is made to set aside the attachment, he may be able to resist it on the pretext that he has lost a trial. In the Court of King's Bench it is regular to add bail to an attorney. *Rex* v. *Sheriff of Surry*, 2 *East*, 181. *Foxall* v. *Bowerman*, *Ibid.* And the Plaintiff cannot treat the bail as a nullity: and even in this court, it is admitted, that if notice had been given in due time, of justifying the same two persons, as fresh bail, they would have been good bail.

Best, in support of his rule.

MANSFIELD Ch. J. The Court has formerly said, that a good bail and an attorney are no bail, and that although a third good bail be added, still the three are nothing: but in the case cited it does not appear that the bail were excepted to; or at least the Plaintiff applied for an assignment of the bail-bond, which imports that he treated the bail as a nullity. But here, the Plaintiff, by excepting, shews, that he does not consider the bail as a nullity, and admits that he is willing to receive and assent to these bail, on the condition that they justify in court. He waives therefore this objection, that the attorney was originally one of them. It is much better to have the practice of the two courts uniform.

Any persons may be bail for the purpose of rendering the principal.

HEATH J. This Court has in several instances freed the practice from the niceties which formerly prevailed in it respecting bail. It was once held, that after bail had been rejected, they could not surrender their principal. It is now held, that they may enter into a new recognizance for the purpose of making the render, and that any persons whatsoever, even if they came out of

 Newgate,

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Newgate may become bail for that purpose. In the circumstances of the present case there are two methods, in either of which the Plaintiff may proceed: he may either treat the bail as a nullity (*a*), and take an assignment of the bail-bond; or consider them as bail *pro formâ*, and except. The ground of the rule which prevails here is, that two bail being required, one bail is no bail. This Court has always held, that bail, one of whom is an attorney, are a mere nullity.

CHAMBRE J. It might have been as well if the rule in *Jackson* v. *Hillas* had not been made. But there is a distinction between that case and this. It is very mischievous that the practice should depend upon such niceties.

Rule discharged.

May 4, 1794.

(*a*) RICHIE *v.* GILBERT.

An attorney no bail.

MOTION to set aside an attachment against the sheriff for not bringing in the body. The Defendant had put in bail: the Plaintiff not having excepted to them, but having proceeded to obtain an attachment, the Defendant obtained a rule to set it aside, conceiving it to be irregular; which would have been the case, had not the Plaintiff obtained his attachment on the ground that one of the bail was the Defendant's attorney, therefore no bail.

Per Curiam. Let the rule be discharged on the ground that one of the bail was an attorney; and that therefore there was no bail to the action.

Nov. 15, 1794.

CAKISH *v.* ROSS.

An attorney's clerk, though not under articles, is objectionable as bail.

THIS was an application to justify bail: one of them lived with an attorney as his clerk, though not under articles. Both the Court and the Bar were of opinion the rule only extended to clerks under articles.

Buller J. In the King's Bench this rule extends to all clerks; they are equally exceptionable, for the purpose of being bail, as attornies.

Eyre C. J. Let this bail be rejected; such being the practice of the Court of King's Bench.

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If no directions are given respecting the costs of an award, they are to be paid by both parties equally.

ALL matters in difference having been referred, without any special direction as to the costs of the reference, the arbitrator awarded 650*l.* to be paid to the Plaintiff by the Defendant, but made no direction as to the costs of the reference, nor did he make any demand on the parties for the costs of the award. The Defendant having no claim against the Plaintiff, had no interest in taking up the award, but before either party had seen the award, the Defendant having arranged with the Plaintiff the sum proper for the arbitrator's fee, made an offer to the Plaintiff of paying half the costs in case the sum awarded should be less than 200*l.*, but added, that if more were awarded, he would pay no part of them. It did not however appear that his proposal was ever accepted by the Plaintiff. The Defendant's attorney sent his clerk with the Plaintiff's attorney, at his particular request, to take up the award, and the clerk, upon a representation from the other that he was to pay half the costs of the award, paid, for the Defendant's moiety, the sum of 13*l.* 6*s.* 6*d.* The Defendant, upon learning the circumstances, tendered to the Plaintiff 636*l.* 13*s.* 6*d.* only, insisting that he was entitled to retain the residue, to re-imburse himself for the moiety of the costs of the award which he had advanced.

Williams Serjt. now shewed cause against the Plaintiff's right to an attachment for non-performance of the award, upon the ground that the clerk had been prevailed on by a misrepresentation to pay the money.

Best Serjt. supported the rule.

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MANSFIELD Ch. J. If no directions are given respecting the costs of the award, certainly they are to be paid by both parties equally. There may have been some misconception between these persons, but the money has been paid as it ought to be paid, and the Court cannot alter it.

HEATH J. concurring,

Rule absolute with Costs.

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EDWARDS *v.* MINETT.

Claims being made on a prize agent by several persons for the prize money due to one sailor, he was permitted, as a public officer, to pay the money into court for the benefit of the claimant who should prove his authority ro receive it.

BEST Serjt. on a former day, moved for a rule to shew cause why the Defendant in this case might not be permitted to pay money into court without costs, and why all further proceedings should not be stayed till the Plaintiff's attorney should produce the Plaintiff in his proper person to the Court. The Defendant was a prize agent for certain ships which had been captured, and admitted the right of the Plaintiff, who was a sailor, to the prize money sought to be recovered in this action. The Plaintiff had executed a regular assignment of a part to a person named *Hoad,* and two other persons named *Levi* and *Zachariah,* had severally given notice to the Defendant that they respectively claimed the same money, and had attached the money in his hands. The Defendant was only anxious that it should come to the hands of the Plaintiff, who was fighting the battles of his country.

HEATH J. This is the case of a stakeholder, in which I do not know that such a motion has ever been granted: the case of a sheriff is that of a public officer to whom the Court owes an especial protection.

Best

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Best observed, that a navy prize agent is a public officer recognized by stat. 45 *G.* 3. *c.* 72.

A rule *nisi* was granted, upon notice of the rule to be given to the several claimants, which upon this day was made absolute, with the addition of a reference to the prothonotary by the consent of the several claimants, to ascertain which of them was really entitled to the money; and the costs of the action, and of the application to the Court, were ordered to be in his discretion.

Vaughan Serjt. *contrà*, for the garnishor *Levi*.

CLIFFORD *v.* TAYLOR.

Feb. 12.

Under a Judge's order to produce papers and give copies, it is sufficient to give extracts of those parts of letters which are relevant to the subject.

BEST Serjt. having obtained a rule that the Defendant should have a week's time to plead after the delivery to him of certain policies, letters and papers mentioned in his affidavit,

Shepherd Serjt. now shewed cause, on the ground that as to certain letters, of which the Plaintiff had already delivered extracts, it was sworn that the residue of their contents did not relate to the subject.

MANSFIELD Ch. J. It would be convenient if the Plaintiff were required to verify on oath in the first instance, that the papers delivered are all the papers he has. This practice of compelling the delivery of copies is very convenient, for it saves the delay and expence of a bill in equity. But the practice in Chancery invariably is, that a party is entitled only to extracts of letters, if the other party will swear that the passages extracted are the only parts which relate to the subject matter. Without staying the proceedings, let the Defendant take out a

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summons, in the most general terms, requiring the production of all papers; and if he is not content with such as are thereupon given him, the Plaintiff must make a special affidavit, denying the relevancy of the parts withheld.

Rule discharged.

Best in support of the rule.



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SPARKES *v.* O'KELLY.

Where a writ of error is brought upon a judgment on demurrer, in the case of a *scire facias* sued out pursuant to the statute 8 & 9 *W.* 3. *c.* 11. *s.* 8., bail in error is not required.

THE Plaintiff was the assignee of an annuity granted by the Prince of *Wales* to *Samuel Chiffney.* The Defendant executed a bond, as a collateral security to the Plaintiff, conditioned to be void " if his Royal Highness *George* Prince of *Wales*, or the treasurer of his privy purse for the time being, or any other person for his said Royal Highness, or the said Defendant, his heirs, executors, or administrators, did and should well and truly pay, or cause to be paid, unto the said Plaintiff, or his assigns, during the natural life of his Royal Highness, an annuity," or clear yearly sum of 210*l.* Default having been made in the payment of the annuity, an action was brought against the Defendant upon this bond, and the Plaintiff having assigned breaches under the statute of 8 & 9 *W.* 3. c. 11. s. 8., obtained final judgment in *Hilary* term 1806, and levied in execution the amount of the arrears which were then due. Afterwards, in *Easter* term 1806, he sued out a writ of *scire facias* for subsequent arrears, upon which he also obtained judgment on demurrer to the replication (*a*.) The Defendant brought a writ of error upon this judgment, but did not put in bail.

(*a*) See *Sparkes* v. *O'Kelly*, 2 *N. R.* 421.

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The Plaintiff having taken out execution, and levied notwithstanding the writ of error, a Judge's order was obtained, directing "that the execution should be withdrawn, the same having been levied pending a writ of error." A rule was granted in the last term, calling on the Defendant to shew cause why this order should not be discharged.

Heywood Serjt., in the same term, shewed cause against the rule. Bail in error was not necessary at common law. But there are three statutes which require that the Plaintiff in error should give bail in certain cases. Two of these, viz. 13 *Car.* 2. *st.* 2. *c.* 2. *s.* 9., and 16 & 17 *Car.* 2. *c.* 8. *s.* 3. are confined to writs of error brought after verdict, and are therefore inapplicable to the present question. This case must therefore depend upon the construction of the statute 3 *Jac.* 1. c. 8., which provides that no execution shall be stayed by any writ of error for reversing any judgment "in any action or bill of debt, upon any single bond for debt, or upon any obligation with condition for payment of *money only*, or upon any action or bill of debt for rent, or upon any contract," unless bail in error be previously put in. In construing this statute, it has been determined that it must be taken strictly. Lord *Mansfield* appears at first to have entertained a different opinion; but he afterwards yielded to the weight of authorities. *Trinder* v. *Watson*, 3 *Burr.* 1567. In the act 3 *Jac.* 1. *c.* 8. no mention is made of the proceeding by *scire facias*; nor can it be considered as included within any of the terms used in that statute. An action is brought to obtain a judgment: the object of a *scire facias* is to get execution upon a judgment already obtained: *Hartop* v. *Holt*, 1 *Ld. Raym.* 97. The debt in this instance was originally founded upon a speciality, but it is now become a debt upon record.

The

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The nature of it has been changed by the judgment, and the *scire facias* issues, not upon the original security, but upon the judgment. In *Bidleson* v. *Whytel*, 3 *Burr*. 1545. it was decided that an action upon a judgment was not within the statute. The grounds of the opinion of the Court, as delivered by Lord *Mansfield* in that case, are equally applicable to the present. It was stated, 1st, that the contract was extinguished by the original judgment; 2dly, that a judgment is no contract, for *judicium redditur in invitum*; 3dly, that an action of debt upon a judgment is an action of a superior nature to an action of debt upon bond, &c.; 4thly, that this statute ought rather to be taken literally than extended. There is no distinction between the present, and the ordinary case of a *scire facias* on a judgment, except that here the object is to obtain execution for only a *part* of the sum for which the judgment has been signed. But in both cases the judgment is the basis of the proceeding. He also contended that the original judgment was not within the statute, because it was not founded upon an obligation for the payment of *money only*. The bond was given to secure the payment of an annuity by the Prince of *Wales*, which had been assigned by the original grantee to the Plaintiff. By the 35 *Geo*. 3. *c*. 125. *s*. 7. it is required "that the creditor shall within ten days after the expiration of the quarter of the year in which the demand accrues, deliver in to the treasurer, or principal officer of his Royal Highness, a particular of the demand for the purpose of its being audited, &c." It is necessary that the grantee should do certain acts, for the performance of which the Defendant is responsible. It is true that this is not in terms expressed in the condition, yet it must be considered as virtually incorporated into and forming a part of it. This therefore is not an obligation for the payment of *money only*, but is more like a bond for the performance of covenants. The operation of the

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he statute of 3 *Jac.* 1. c. 8. has indeed been gradually extended; but it has never been carried so far as to comprehend a case like the present. The case which approaches the nearest to it, is that of *Chauvet* v. *Alfray*, 2 *Bur.* 746. which arose upon a bond for the payment of a composition in default of the debtor; but here the Defendant not only undertakes to pay in default of another, but also, in effect engages, that the grantee shall do certain acts, without which there could be no claim upon the Prince of *Wales*. This therefore cannot be considered as a judgment founded upon an obligation for the payment of *money only*.

Bayley Serjt. *contrà*. It is sufficient to look at the condition of the bond to be satisfied that this is a security for the payment of *money only*. [*The Court* interposing, desired *Bayley* to confine himself to the other point. The action, they observed, was founded solely upon the bond, not upon any thing to be done by *Chiffney*.] This then is not like the ordinary case of a judgment upon a contract. There the judgment extinguishes the contract; but in this case, by the words of the act 8 & 9 *W.* 3. *c.* 11. *s.* 8. the judgment is only a security. The condition still continues in force. The proceedings are not upon the judgment, but upon the subsequent breaches. The whole may be considered as one action founded upon the contract, the judgment being a security for what is due in the first instance, and also for what may become due for future arrears. The *scire facias*, then, is merely a continuation of the suit; or, if it be considered a new action, it is an action founded upon the contract. For in this proceeding, as in the original action, it is the breach of that contract which is the subject of complaint. No authority in point either has been, or can be cited on the other side. The case of *Bidleson* v. *Whytel* does not apply; for there the debt

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debt was extinguished by the judgment. The action was founded on the judgment alone, not on any new matter connected with the original contract. But in the instance now before the Court, the judgment is not the cause of action, but the subsequent default. No action in this case could have been brought upon the judgment. Upon the assignment of the first breach, bail in error would be required. Why then should a different rule prevail with respect to the assignment of the subsequent breaches? The object of the statute was to assist Defendants, and to give them that relief at law, which, before the passing of the act, could have been obtained only through a court of equity; but it was not the intention of the Legislature to deprive the Plaintiff of his right to bail in error.

Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court.

The only question to be considered is, Whether in this case bail in error is required by the statute 3 *Jac.* 1. *c.* 8.? There is much force in the reasoning which has been urged in support of this rule. It has been observed, that this is not like the case of an action upon a judgment. For an action upon a judgment is brought to recover a sum of money, which has already been awarded by that judgment to be due. But here the proceeding is founded substantially upon a new cause of action; for the *scire facias* is brought to recover a sum claimed on account of a subsequent breach of the original contract: And it has been thence inferred, with much plausibility, that error ought not to be brought to set aside this judgment on the *scire facias,* unless bail are put in. Upon considering this question, however, we think that the statute 3 *Jac.* 1. c. 8. does not apply. It does not apply in terms; nor could it have been intended to apply; because

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cause a case arising out of an act passed so many years afterwards, could not possibly have been in the contemplation of the Legislature, when this statute was framed. What then are the words of the act 3 *Jac.* 1. *c.* 8.? No execution shall be stayed by writ of error "in any action, or bill of debt, upon any single bond for debt, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract." These words are confined to actions of debt upon bond, for rent, or upon contract: they do not embrace, nor could they have deen intended to embrace, such a case as the present. It has been decided by the cases in *Burrow*, that in an action on a judgment no bail in error is required; and although this is not the case of an action, but of a *scire facias*, it clearly is a proceeding upon a judgment, and comes within the reason and the meaning of those decisions. We are of opinion, therefore, notwithstanding the distinction which has been taken between an action upon a judgment and this proceeding by *scire facias*, that the present case does not come so clearly within the scope of the act 3 *Jac.* 1. *c.* 8., as to authorize the Court to deprive a party, because he does not comply with the provisions of that statute, of the full benefit of his writ of error.

Rule discharged.

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Feb. 1.

EASTMAN *v.* BAKER.

An executory devise over, contingent in case of *J. B.* shall die and not attain the age of 21, or having no issue, is defeated either by *J. B.* attaining 21, or by his having issue.

THIS was a writ of intrusion, in which the Plaintiff by his count entitled himself to certain premises called *Heale Down*, as elder brother and heir to *William Eastman*, to whom the reversion in fee of the premises, expectant upon the death of *Mary Baker*, a devisee for life, was stated to be devised by the last will and testament of *Jane Boatfill*, who was alleged to have been seised in fee of the premises. The Defendant pleaded several pleas, the fourth of which was, that " before *Jane Boatfill* had any thing in the same tenements, *John Boatfill*, her father, was seised of the premises in his demesne as of fee and right, by taking the esplees, &c." And that being so seised thereof, he duly made and published his last will and testament in writing, duly executed and attested to pass real estates, and thereby devised as follows; to wit, " I also give, devise, and bequeath unto my said daughter *Jane*, all the right, title, property, interest, claim, and demand whatsoever, that I now have in a certain messuage and tenement lying in the parish of *High Bickington* in *Devon*, called *Heale Down*, from and immediately after my decease, *without impeachment, to her and her heirs for ever and ever: but if my said daughter shall fortune to die, and not attain the full age of one-and-twenty years, or having no such issue as aforesaid, then I give, devise and bequeath the same premises, with the appurtenances, unto my dear and well-beloved wife* Mary Boatfill, *in manner and form aforesaid. Item,* all the rest, residue, and remainder of my goods, chattels, lands, tenements, and hereditaments not hereinbefore given and bequeathed, and all things whatsoever or wheresoever, in whose custody, power or possession soever they now are, or shall here-

hereafter be, I give and bequeath the same unto my dear and well-beloved wife *Mary Boatfill*, whom I do make and ordain my whole and sole executrix of and in this my last will and testament, and also to be in trust for my said daughter during her minority: and I do hereby revoke, disannul, and make void, all and every other and former will or wills heretofore made, allowed of, and executed by me. Provided nevertheless, and it is the true intent and meaning of me the said *John Boatfill* the donor, *that if in case my said daughter* Jane *shall survive my said wife, then in such case I give, devise and bequeath all and singular the former and above lands, tenements, goods, chattels, and hereditaments, and all other the premises, unto my said daughter* Jane *for ever and ever, without impeachment*." The plea further stated, that *John Boatfill* afterwards died so seised, without revoking or altering his will; whereupon, and under and by virtue of the said will, the said *Jane Boatfill* became and was seised of the premises *according to the same will*, and afterwards died so seised, *without having ever been married, and without issue, in the lifetime of her said mother*, then *Mary Baker*; whereupon, and by virtue of the said will of the said *John Boatfill*, one *John Baker* and the said *Mary Baker* his wife, in right of the said *Mary Baker*, became and were seised of the same tenements in their demesne as of fee, to wit, to them and the heirs of the said *Mary*. The plea then proceeded to entitle the Defendant as devisee for life under the will of the only son and heir of the feoffee of the heir of *Mary Baker*; and concluded by traversing the allegation contained in the count, "that upon the death of the said *Jane Boatfill*, *Mary Baker*, under and by virtue of the will of the said *Jane Boatfill*, became seised of the premises, and *William Eastman*, also thereby became seised of the reversion of the premises in his demesne as of fee, expectant on the decease of the said *Mary Baker*, in manner and form as the

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the Plaintiff had alleged. The Plaintiff replied, that the said *Jane Boatfill*, after she became seised, *attained the full age of* 21 *years*, and that she afterwards duly made and published her said last will and testament in writing, in manner and form as he hath in his count in that behalf alleged. To this replication the Defendant demurred, averring that the Plaintiff by his replication did not deny or destroy the Defendant's title. The Plaintiff joined in demurrer.

Shepherd Serjt., for the Defendant. This demurrer calls upon the Court to declare what estate *Jane Boatfill* took under the will which is here pleaded: for if she took an estate in fee simple, which became absolute on her attaining the age of twenty-one years, she might after that age dispose of it by will; and then the replication is a good answer to the plea; if she did not take an absolute estate in fee upon that contingency, she had not such an estate which she might devise, and the replication is insufficient. The question here is, Whether the word or may be so construed as to mean *and*. The cases on this point are numerous, and the decisions have been contradictory. A case, which doubtless will be much relied upon by the Plaintiff, is that of *Fairfield* v. *Morgan*, 2 *New Rep*. 38. That was a devise in fee to B. *Smith*, with a devise over, "in case he should die before he attained the age of 21 years, or without issue living at his death." It was there held, that if he attained the age of 21 years, his estate should be absolute; but the principal reason assigned for the judgment of the Court was, that if this construction were not adopted, it would follow, that although the devisee should have a numerous family, he could never charge his estate to raise money for their occasions, because it would be uncertain during his life, whether he might not survive all his issue; upon which contingency the estate at his de-

cease

cease would go over, and all his incumbrances must be avoided. But that reason is not applicable to the present case, because the words of this devise are, "if she shall die without having issue:" here the condition would be performed by her having issue born. The word "or" is to be construed conjunctively, in order to effectuate the testator's intention; the Court will not, therefore, give it that construction, where the will clearly shews that the testator did not mean that the word should be so changed. The testator might if he pleased, so limit this fee, that it should not absolutely vest in his daughter but upon the concurrence of three conditions, namely, that she should attain the age of 21, that she should have issue, and that she should survive her mother. And he has in effect done this. The will contains two devises: the first is to his daughter, the second is to his wife. By the first, the testator gives to his daughter in fee simple his estate at *Heale Down*, with a contingent devise over to his wife, in either one of two events, if the daughter should die before 21, or if she should fail to have issue. By the second devise, he gives his residuary estate to his wife for her life: he then declares that if his daughter shall survive his wife, he gives all his former, (meaning those which were the subject of the first devise,) and *above* lands (meaning those which were the subject of the residuary devise,) to his daughter: and, as if he had been conscious that his language was inaccurate, he adds, in explanation of his meaning, that in such case that she shall have the lands for ever and ever. The effect of the last clause is, to superadd a new condition to his daughter's estate: namely, that she shall survive his wife. It is equivalent to saying, that she should not have it in fee, unless she should survive his wife. Therefore, whether upon the first part of this devise there are two conditions, or only one, to be performed by the daugh-

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fer, at all events the Plaintiff in this action cannot recover. For how far soever the first part of the devise may come within the principle of *Fairfield* v. *Morgan*, and the other cases of that class, this case, is entirely taken out of that general rule by the concluding explanatory clause, which annexes the new condition of her surviving the mother. The Court will not reject words which are added at the end of the will, and declared to be explanatory of the whole that precedes. [The Court requested him to consider, whether, if this last clause were to be so interpreted as to give the daughter a fee, only in the event of her surviving her mother, it would not, by necessary implication, give the mother an estate for life, and wholly revoke the first devise to the daughter in fee, so that the daughter would take no estate till the mother's decease.] *Shepherd* denied that the will could be so construed. It is immaterial to the Defendant whether the mother took under the residuary devise to her beneficial interest or not: if it were even an estate in fee simple in trust for the daughter, that is not important. The testator gives to the mother by that second devise either a life estate, or none; if it is a life estate, the reversion in fee is devised to the daughter. It is not, however, necessary to decide how the daughter's estate is affected by the second devise, the question merely is, What estate she took under the first; that is, what would have become of the estate, upon the death of the daughter, living the mother, in case the testator had not superadded this third condition of her surviving the mother. For the only answer given to the plea, is, that the daughter attained the age of 21 years; the Plaintiff infers that she took, upon that event, an absolute fee; but that is not so; for the direction of the testator that she should take an absolute fee upon her surviving her mother is wholly inoperative, unless it thence follows, that if she should not survive her mother, she should not

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take an estate in fee. Secondly, if the estate became absolute upon the daughter attaining the age of 21, still there is ground to argue that she took under this will only an estate tail. It is difficult to understand the distinction laid down in some of the books. In *Pells* v. *Brown, Cro. Jac.* 590., it was held that a devise "to *A.* and his heirs, but if he shall die without issue, then over," created an estate tail; but that a devise "to *A.* and his heirs, and if he should die without issue, living *J. S.*, then over," created an estate in fee simple, defeasible upon a contingency. And so it would be, if the devise were, "in case he should die without issue living at the time of his decease;" and the reason is, because there an additional circumstance or condition is annexed. But where there are two separate alternative conditions annexed, one of which is the attaining the age of 21, no reason can be assigned why the other condition, that of the devisee having issue, should therefore the less be construed to create an estate tail. [*Mansfield* C. J. An estate tail has never been given upon a will like this, where one of the contingencies is, the event of the devisee himself dying under age: in such cases the dying without issue is not considered as indefinite and general, so as to create an estate tail, but is referred to the concomitant words of dying under age.]

Williams Serjt. *contrà.* The daughter took an estate in fee simple, with an executory devise over, in case she died under the circumstances mentioned in the will. First, as to the question whether this will gave the daughter an estate tail. It is now nearly a century since it has been argued that the words "without issue," coupled with such other words as are here found, would constitute an estate tail. 1 *Roll. Abr.* 611. *Devise. K.* 9. 1 *Roll. Abr.* 835. *Estate tayle per Devise,* 1, 2. *Fairfield* v. *Morgan. Price* v. *Hunt, Pollexfen,* 645. This last

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case proves two points, 1. that the word *or* is to be construed conjunctively; 2. that the first devisee took an estate in fee, with a remainder over upon a contingency. *Barker* v. *Surtees*, 2 *Str.* 1175. No period is shewn within which the devisee in this case is to die without issue. Some such period must be shewn, or it is an absolute devise in fee. If there be a devise "to *A.* and his heirs; but if he die without heirs, then remainder over to *B.*, the remainder over is void. *Framlingham* v. *Brand*, 3 *Atk.* 390. *S. C.* 1 *Wils.* 140. and *Doe ex dem. Davy* v. *Burnsal*, 6 *Term Rep.* 34. [*Chambre* J. suggested for his consideration, whether, as the first devise gave the property to the daughter and her *heirs*, with a devise over "if she dies leaving *no such issue as aforesaid*," those last words might not refer to the word *heirs*, as heirs of her body ?] No meaning can be assigned to those words, which tends to shew that she was not to have a full power over the estate if she lived to attain twenty-one, although the estate was to go over if she died without issue. Too much stress must not be laid on the particular words, "such issue as aforesaid; but the whole clause must be taken together; and upon the whole clause she took an estate to her and her heirs for ever. The testator had two objects of his bounty: if the daughter died before twenty-one, he was desirous that his estate should pass to her mother; but if the daughter once attained that age, he meant that it should no longer go to the mother, unless the daughter chose to give it; that from thenceforth she should have a full disposing power over the estate. On this principle all the cases cited depend. In all of them it has been the testator's intention, that if the devisee had no issue, and died during his minority, the estate should go to the heir of the testator; but if the devisee once attained twenty-one, he was of an age to judge for himself, and might dispose of the estate as he would; or if he once had issue, those issue were

were objects of the testator's benevolence, and the estate should remain to them. The residuary clause in this case gives the property to the wife, only for her life, and that too, in trust for the testator's daughter during her minority. The daughter is the principal object of the testator's bounty. If she comes of age, the wife's estate for life is determined, and thus the whole will is made consistent; for it first gives the daughter an estate in fee, with an executory devise over to the mother; it next gives the mother an estate for life in the residuary estate, in trust for the daughter during her minority; for the words, "*former and above lands,*" refer only to the property described in the residuary clause, and not to the *Heale Down* estate; and lastly, in case the daughter shall survive the mother, then the residuary estate is given to the daughter in fee. But even if the words "former and above," do refer to the subject matter of the first devise, still the daughter, in the case of her surviving her mother, is to take the whole, unfettered by any contingency.

Shepherd in reply. It is evident that the testator has in his first devise to *Jane Boatfill* so used the word heirs as to mean heirs of the body; because the will contains no other expression to which the words "issue aforesaid" can refer: if he meant to use the words in that sense, nothing in the law prevents him from effectuating that intention. The latter words may so control the former, as to shew that he meant to give an estate tail. As if a man devise "to *A.* and his heirs; and if *A.* die without issue, then over to his own right heirs; that is clearly an estate tail, and will bear no other construction. So, here, as no other word is to be found except the word heirs, to which "issue aforesaid" may refer, "heirs" must mean heirs of the body: in the concluding clause when he designs to give a fee to *Jane Boatfill*, he omits the word heirs, which is an argument to shew that he

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thought the word "heirs" meant issue. It was his design then to give his daughter an estate tail, which would be defeated in case she should not live to attain the age of twenty-one years, or should not have issue. If she took an estate tail, it is clear that her will could not operate on it, and the demurrer must prevail.

Cur. adv. vult.

MANSFIELD Ch. J. now delivered the opinion of the Court.

The question raised was, whether *Jane Boatfill*, having died before her mother, without issue, but having attained twenty-one, took an estate in fee or not. To decide that, it is only necessary simply to read the will. The words are, "I devise to my daughter all my right, title, and property in a certain messuage called *Heale Down*, from and immediately after my decease, without impeachment, to her and her heirs for ever and ever. But if she shall fortune to die without issue, or not having attained the age of 21 years, then I give the same to my dear wife in manner and form aforesaid." That must be, "to her and her heirs for ever and ever." Then follows a devise of the residue to his wife, and after that a proviso, "that if in case my said daughter shall survive my said wife, then I give all my said lands, &c. to my said daughter *Jane* for ever and ever without impeachment." It is not easy to comprehend all that the testator had in his mind; but upon these words, which give all that he had to his daughter for ever, upon her surviving her mother, there is no reason to say that he intended to give her any other estate than an estate in fee. He has omitted the word heirs; but it is impossible not to see that he meant to give her the absolute property. The next question is, whether "or" in this place means "*and.*" According to *Fairfield* v. *Morgan* and the other cases cited, it must mean *and*, because if it

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does not, it follows, that upon the contingency of the daughter dying, having issue, but not having attained the age of twenty-one years, the estate would pass over from her children; which could never be the testator's intention. This then is nothing more or less than an executory devise over, contingent upon the event of the daughter's dying in the life of the mother without attaining the age of twenty-one years, and without having issue.

Judgment for the Plaintiff.

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J. T. demised land to the Plaintiff at an annual rent for 21 years, with liberty to dig half an acre of brick earth annually: the lessee covenanted that he would not dig more, or if he did, that he would pay an increased rent of 37 [illegible]l. per half acre, *being after the same rate that the whole brick earth was sold for.* A stranger dug and took away brick earth: the lessee recovered against him the full value of it. It was held that he was entitled to retain the whole damages.

BEST Serjt. had, in *Michaelmas* term last, obtained a rule *nisi* for setting aside the verdict which had been found upon the execution of a writ of inquiry, after judgment suffered by default in this action. The declaration was in trespass, and stated that the Defendant had broke and entered the Plaintiff's close, and dug therein and carried away a quantity of brick earth of the Plaintiff, and converted it to his own use. There was also a count for taking, carrying away, and converting other brick earth of the Plaintiff. The circumstances of the case, as disclosed by the affidavits, were, that by indenture of lease, dated the 15th of *June* 1792, *James Theobald* had demised to the Plaintiff several closes of land at *Gray's*, in *Essex*, containing 565 acres, (excepting thereout the land let to *James Burn*, whose lease had come by assignment to the Defendant,) together with full power to the Plaintiff to dig to or for brick earth or clay, and to make or convert the same into brick or tiles,

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as therein after mentioned, to hold to the Plaintiff for a term of 21 years, at the rent of 1075*l*. *per ann*. The lessor covenanted that the Plaintiff should have, take, and enjoy from and out of certain grounds, containing 38½ acres, including therein a certain field called the *Brick-field*, containing 5½ acres, [the remaining part of which was let to *James Burn* and others,] with free right and liberty annually to dig, turn up or sink to the depth of 20 feet from the plane surface, one half acre of the said ground, for the purpose of obtaining thereout brick earth and clay to be made into bricks or tiles, or otherwise to be disposed of as the Plaintiff should think proper; and the Plaintiff covenanted not to dig more than half an acre in any one year, *or*, in case he should dig any greater quantity, that he should pay unto the said *James Theobald* the increased rent of 375*l*. for every half acre so dug, *being after the rate that the whole brick earth was thereby sold or intended to be sold.* Upon the execution of the writ of inquiry the Plaintiff proved that the Defendant had excavated a piece of ground of the extent of 48 perches, part of the 38½ acres destined by the lease for digging brick earth; and that the clay taken from thence was of a quality for making bricks superior to the residue of the Plaintiff's land, but he gave no evidence of any injury done to his possession, other than the loss of this earth. On the behalf of the Defendant it was represented to the jury and the under-sheriff, that they ought not to adopt for their measure of damages the full value of the earth so taken, because the Plaintiff had a mere possessory interest in the soil, and no right to the soil itself, beyond the extent of half an acre annually: That this trespass did not impede him in the exercise of his right to take his annual half acre, because the 38½ acres were much more than enough to furnish the half acre for every year during his term; and that therefore the Plaintiff was entitled to nominal damages only, inasmuch

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as the Defendant would, after the event of this action, remain responsible for the value of the earth dug to the Plaintiff's landlord, to whom it belonged. That, on the other hand, if the Plaintiff were permitted to recover the full value of the earth, he would recover what did not belong to him, for that he would not be liable to his landlord for any increased rent in respect of the earth for which these damages were given, since it was not dug by himself, the lessee, but by a stranger. The jury, however, found a verdict for the Plaintiff with 550*l.* damages, which they considered to be the full value of the whole of the brick earth so dug by the Defendant.

Lens Serjt. shewed cause against this rule. If the Plaintiff is entitled to any thing more than mere nominal damages, he is entitled to the full amount of the present verdict. This lease is a mode by which the tenant purchases this brick earth. In the course of his term he might take the whole 38½ acres, paying the further rent stipulated: he had a right to the soil itself; he certainly would during his term have used the soil in question, which was the best in the field; the taking it, therefore, clearly occasioned a loss to the lessee. It is doubtful whether the landlord could recover any part of these damages, as for an injury done to his reversion; or if he could, his damages must be merely nominal: he has parted with every interest in this earth, except the bare possibility that the tenant might not chuse to dig it at the stipulated price during his term. If it would be waste in the tenant to dig this soil himself, he would be answerable to his lessor in waste if a stranger dug it; and therefore he would have a title to recover the full value against the stranger. But he claims by a still stronger title. The lessee cannot commit waste by taking this earth; for his covenant gives him a right to take it: *primâ facie* he has purchased the whole, notwithstanding the

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contingent interest which perhaps remains in the landlord, in case the tenant should perchance omit to convert during his term any part of the ten acres and a half. Therefore when it is urged that the Plaintiff may take his 10½ acres in some other part of the 38½ acres, he may answer that he has a right to take the whole 38½ acres, if he will: during the lease consequently, till it is clear that he will leave some part of them to revert to the landlord, the taking the earth is an injury to the tenant only. The Defendant cannot reply that he leaves sufficient: it is not competent for him to carve out a portion for the tenant, who in common prudence will elect first to dig the best earth, which is that now taken from him. This is not an easement; it is not a mere option given to the lessee, enabling him to do something for which he is to pay when it is done, but it is at all events an actual purchase of ten acres and a half of the soil itself to be taken where the lessee pleases; and the soil, when so taken, is the tenant's, not the landlord's soil. The Plaintiff does not contend that he can deprive the lessor of his remedy, but if the lessor sued the stranger, his right must be reduced, upon the production of this lease, to mere nominal damages: for the lease would shew that he had absolutely sold the very soil, that it could never more become part of his inheritance, provided the tenant chose to take it. If the landlord can recover of a stranger the value of the half acre of soil for which the lessee has paid 375*l.*, he will be doubly paid for it, and the lessee, who can by no possibility afterwards take that same soil, will have paid his rent without receiving the benefit meant to be given by the lease. The effect of this lease is, that the landlord is thereby estopped of waste against his tenant, and he must be also estopped of waste against a stranger. [*Chambre* J. If damage is done, the lessor may sue his tenant or the stranger: but if he accepts satisfaction from his lessee, he cannot sue the

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the stranger; he cannot sue twice for it.] In this case the landlord has actually received the value of the 10½ acres; for the price of them is included in the rent; he has therefore been satisfied for them; the tenant has not. To whom, then, shall the recompence for the injury be paid? Undoubtedly to the tenant, who has bought the soil; not to the landlord, who has sold it, and has been already paid for it.

Best Serjt. *contrà*. There are two questions in this case: the first is, whether the damages are not improperly taken according to the injury stated in the declaration, which alleges no special, or consequential, or partial damage, but the mere loss of the soil itself, which is the property of the landlord. The tenant is not entitled to the value of any part of the soil. It is conceded to me, that if the landlord can recover this value against the stranger, the tenant is not entitled to it. Granting that if the landlord had sold the soil, he could no longer recover the full value, still this lease conveys merely an easement. The second question is, if the Plaintiff had declared in another form, what could he have recovered? The only damage the tenant could sustain in this case, is, if there had been any thing peculiar in the quality of this soil, which made it preferable to the rest of the ground; but in that case he should have sued for the difference in quality, and should have pointed out by his declaration the nature of his claim. It is not true that this soil has been paid for by the tenant. He has paid nothing more than the 1075*l.*: that rent includes only the price of the 10½ acres, and it is sworn that the Plaintiff has not yet taken to the extent of his half acre *per annum*, computing from the commencement of his term. This is not necessarily a part of those ten acres and a half. But if it were, the lessee has not yet a vested property in the soil of those ten acres and a half. Acts

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are to be done by him, to invest him with the property. The grantor of a common does not give even the grass, till the grantee takes it by the mouths of his cattle. If the tenant does not elect to take this earth, it continues the property of the landlord. [*Chambre* J. mentioned a case in *Croke (a)*, where power was given to take so many trees in a wood, and it was held that the property did not vest till choice actually made. *Mansfield* Ch. J. Under this peculiar contract the tenant has a right to the possession not of the surface merely, but of every ounce of earth to the full depth: the only question is, what is the measure of the damages. If the trespass were committed in valuable arable land, which the tenant has a right to use only for the purposes of cultivation, the landlord has his action of waste; the tenant is entitled to recover against the stranger not only in respect of his liability to his landlord, but also for his own loss of the value which the earth is of to himself: the question here is, what was the value of this brick earth to the tenant? If he had begun to dig more than the 10½ acres, unquestionably the lessee would have been entitled to recover the extreme value of the earth dug.]

(a) This seems to be *Basset* v. *Maynard*, *Cro. El.* 819. S. C. by the name of *Palmer's* case, 5 *Co.* 25. *b.* 2 *Res.* where it is said, "If I grant 1000 cords of wood to one to be taken at the election of the grantee; the grantor or a *stranger* fells some trees, the grantee cannot take them, but ought to supply his grant out of the residue." *Hale* C. J., in *Motteram* v. *Jolly*, 1 *Vent.* 271. gives the reason of this case; namely, that the *quality* of trees for cordwood is immaterial, and a special verdict had found that enough for the 4000 cords of wood was left growing. "There, if the grantee can have the *number* of his cords of wood, he hath the effect of his grant; but trees differ in value exceedingly from each other." In the principal case the grantee was to elect 20 of the best trees out of a wood, to be taken within eleven years; and the Court held that the grantor, by cutting trees himself within the eleven years, infringed his covenant; because he abridged the latitude of the grantee's election.

If the lease had gone no further than to grant the 10½ acres, so long as 10½ acres were left, the lessee could not possibly have been entitled to the full value of the earth taken. The lease however goes further: the lessee may take more, but he must pay for it: hitherto he has not had occasion to take any thing under the further grant; and the question here is, whether in consequence of the trespass he has sustained the particular damage here alleged? He has not shewn that the Defendant has taken the very spot which he designed to take himself; if he meant to insist on that, he should have put it on the record. But no special damage is averred. If trees are demised, and a stranger cuts them, the lessee shall have his action of trespass; but the measure of damages is not the value of the tree, but the loss of the shade and fruit during his term. The Plaintiff here can only recover for the use of this soil during his term. He has not the property of the soil itself; he has at most only the privilege of taking it, paying the increased rent. If the lessee had dug his half acre, and a stranger had dug another half acre, the lessor could not have called on the lessee to pay an increased rent for the latter. Upon an issue whether the lessee had taken the further quantity, evidence of a taking by a stranger would not support the affirmative. It must be a voluntary taking, or evidence of actual collusion must be given; the collusion is not to be presumed. [*Chambre* J. It would be going a great way to presume that the tenant colludes with every trespasser: the very distinction between permissive and voluntary waste, is, that the lessee's consent makes it active waste; without consent, it is permissive waste. Suppose an estate without impeachment of waste, voluntary waste in houses excepted; a stranger breaks the house; is that voluntary waste?] The question of waste does not interfere here; for till the 10½ acres are exhausted, the lessee has nothing further to pay. The mistake here is, that possi-

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the direct damage for the value of the thing taken, has been confounded with a special damage: no special damage at all has been here sustained, and only a very peculiar and very improbable combination of circumstances, which has not taken place, and never may, could by possibility make the special damages amount to the value given. The tenant has no right to consider this soil as a part of his 10½ acres, which he has taken by the hands of a stranger; for perhaps he might never have taken it with his own hands, and then it would have reverted to the landlord.

MANSFIELD C. J. on the following day enquired whether there were any cases in which a lessor had recovered damages against a trespasser for an injury to land let? He said that *Jesser* v. *Gifford* 4 *Burr*. 2141. was not a case of land let. That was a case of a nusance in the adjoining land, which was an injury to him in the particular estate, for his interest, and to the Plaintiff, for his reversion. It was contended that the action would not lie; but it would be very strange if that were so; for by the old law, the only remedy in such a case was given to him who had the freehold, by *quod permittat prosternere*. *Williams* Serjt. *amicus curiæ*, cited *Biddlesford* v. *Onslow*, 3 *Lev*. 209. where it was held that both lessor and lessee should sue in respect of trees injured by a stranger, the lessor for the body of the tree, the lessee in respect of the shade and fruit. So may the copyholder and the lord. *Jefferson* v. *Jefferson*, 3 *Lev*. 131. If a stranger subvert land leased at will, the lessee may bring trespass against him, and may have damages for the profits; and the lessor may have another action of trespass, and shall recover damages for the destruction of the land. 2 *Roll*. *Ab*. 551. *N*. 4, 5. [*Mansfield* C. J. No action of waste, or in the nature of waste, lay against tenant at will. If he committed waste, that determined his will, and he became a trespasser: if a stranger committed

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mitted the waste, that did not determine the will. The case of trees is peculiar, for upon their being cut, the property in them instantly reverts to the lessor. *Berry* v. *Heard, Cro. Car.* 242. was a case of trover by the lessor for the bark of an oak cut by a stranger on land of the Plaintiff, then under lease; three Justices against *Croke* J. held the property of the tree, when cut, to be in the lessor. Is there any case on a covenant not to permit waste, where the action has lain for the act of a stranger? Would it be a good plea to such an action to shew that a stranger cut the trees? [*Lens.* Waste would lie in such a case; covenant would not, for he covenants only against his own acts. *Bayley,* Serjt. *amicus curiæ, acc.*] In all actions of waste, the lessor may recover treble damages against the tenant; and if the lessor may also sue the stranger, he would recover single damages against him. How could the stranger plead the lessor's recovery in waste against the tenant, in bar of the action against himself? *Lens.* It could be given in evidence. [*Chambre* J. That would be a bar to the action.] *Cockell* Serjt. *amicus curiæ* mentioned a case tried at *Durham* before *Chambre* J. in which *Russell* was the Plaintiff. It was an action against the Defendant for the injury done to the inheritance by his cutting down a tree growing upon the Plaintiff's land, then in the possession of his lessee. *Bayley amicus curiæ* cited *Tomlinson* v. *Brown. Sayer,* 215. a case of obstruction of lights, in which it was urged that the obstruction might be removed during the term, and so no injury to the reversioner; but it was answered, that the present value of the reversion was diminished, and so the action well lay. [*Chambre* J. I have Mr. Justice *Aston*'s report of that case, which is very different from *Sayer,* for it appears there was an actual injury to the land, by demolishing half the wall.]

The Court took till this day to consider, when they delivered their opinions *seriatim.*

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*CHAMBRE J. This case comes before the Court upon a motion to set aside the execution of a writ of inquiry of damages in an action of trespass; the jury, under the direction of the under-sheriff, having assessed the damages by a rule contended not to be legally applicable to the circumstances of the case. The circumstances, as appears by the affidavits on both sides, are these: The Plaintiff is a lessee for the residue of a term of 21 years, commencing in 1792 or 1793, of an estate consisting of several hundred acres. As to 38 acres, parcel of the farm, the lessor has covenanted that the Plaintiff shall have free right annually during the term, to dig half an acre thereof to a certain depth, for the purpose of obtaining the brick earth, to be made into bricks or tiles, or otherwise disposed of. And the Plaintiff, (the lessee,) has covenanted not to dig more than half an acre in any one year; or that if he did, he should pay an increased rent of 375*l.* for every half acre so dug, which is mentioned to be "after the rate that the whole brick earth was thereby sold for or intended to be sold." The Plaintiff being in possession under this lease, the Defendant, * who has a brick ground adjoining, either wilfully, or by a mistake of the boundaries, dug up and converted the brick earth of a portion of the said 38 acres, parcel of the Plaintiff's farm, which the Plaintiff had not then particularly appropriated for the exercise of his own right: and for this trespass the action was brought, wherein judgment being suffered to go by default, the whole value of the brick earth taken, and all the damages arising from the acts of the Defendant, have been assessed to the Plaintiff, as fully as if he had been owner of the fee simple in the estate, without making any deduction for the interest of the landlord, or for any damages for which the Defendant is liable in an action at the landlord's suit. I am of opinion that the rule given to the jury was wrong, and that the proceedings ought to be set aside.

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It is necessary in the first place to see what were the legal rights of the Plaintiff and of his lessor at the time when the trespass was committed; for the manner in which the Defendant is liable to render satisfaction for the injury he has done, must depend on the nature of those rights at that time. The Plaintiff had the possessory right for the residue of the term: besides this, the covenant of his lessor gave him a special privilege to take the brick earth of half an acre, part of the 38 acres, in each year of the term, without paying any additional rent or compensation for it to the landlord. He had also the further privilege of digging up and appropriating to his own use, the brick earth of the residue of those 38 acres, at any time during the term, either the whole of it, or such parts as suited his interest or inclination; but upon the terms of making a large compensation to the lessor for the exercise of that further privilege. By exercising those privileges, and severing the brick earth from the soil and freehold, he becomes a purchaser of, and acquires a property in, the earth so severed, and the covenant protects him from the consequences of what would otherwise be waste: but, till then, the earth remains a part of the soil and freehold of the lessor. There are no words in the lease to convey any estate of freehold to the Plaintiff; his right rests in covenant; the contract is executory, and it depends upon his own subsequent choice and acts, whether he will take, or the lessor shall part with, any thing by the covenant or not. The Plaintiff's interest then consists in his possessory right, and in the privileges communicated to him by the covenant. He may still take his half acre *per annum* out of the residue of the 38 acres, but the act of the Defendant has prevented him from exercising his further privilege to the full extent; and the main question is, how the value of that further privilege is to be estimated. It appears to me clear, that his beneficial interest therein was no more

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than the difference between the value of the earth taken by the Defendant, and the price that the Plaintiff must have paid for it if he had taken it himself: all the remaining interest was in the reversioner, who, as I conceive, could maintain no action against the Plaintiff for the rent or compensation agreed upon by the covenant, in respect of brick earth dug up and taken, neither by or for the Plaintiff, but by a stranger, against his will; and for which act, so far as it affected the inheritance, and the right which the reversioner would otherwise have had against his tenant under the covenant, the compensation, I apprehend, was due to the reversioner, and the reversioner only; and recoverable by him in an action on the case. Undoubtedly the Defendant is answerable to the full extent of the injury he has done: but to whom is he answerable? Where different persons have distinct rights in the subject of a trespass, the compensation must be to each in proportion to the injury he has received. One of them cannot claim that part of the compensation which belongs to the other; nor can the satisfaction made to one be a bar to an action brought by the other. It can hardly be necessary to cite cases upon this point. I will, however, just refer to two. 19 *H*. 6. 4. 5. and *Biddlesford* v. *Onslow*, 3 *Lev*. 209. It has been supposed in the course of the discussion in the present case, that where there is an existing tenancy for life or years, so that an action of waste may be brought against the tenant for any injury done to the inheritance, that action is the only remedy the reversioner has, and he can maintain no action against the stranger, who in fact commits the waste; but I take the law to be clearly settled otherwise; and that the reversioner may in all cases maintain an action on the case against such stranger, whether the tenancy be at will, for years, or life; or he may, if he pleases, waive the penal action of waste, even against the tenant, and bring case against him.

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The only authority against this, is a *dictum* of Lord *Coke*, in his Commentary upon the Statute of *Marlbridge*, 2. *Inst.* 146, "that if the lessor should not have the action "of waste, he should be without remedy." But all practice is against that *dictum*; and I incline to adopt the supposition of *Pemberton* and *Levinz*, in the case of *Jefferson* v. *Jefferson*, 3 *Lev.* 130, that Lord *Coke* is to be understood according to the subject matter he is speaking of; that is, that he had no remedy by an action of waste: and the rather, as Lord *Coke* himself has taken no notice of the position in his Commentary on the 67th section of *Littleton*, where he treats largely on the subject of waste. There is a full and judicious statement of the law on this subject, in a note of my brother *Williams* upon the case of *Green* v. *Cole*. 2 *Saund.* 252. *b.* The manuscript precedents upon the point, settled by pleaders of the first reputation in their time, are numerous. The case of *Biddlesford* & *Onslow* seems also to be an authority, though the act which occasioned the waste was not an immediate trespass upon the land, but an obstruction of a rivulet in an adjoining piece of land, by which the stream was turned upon the land, and wasted it. That act the tenant had a right to withstand, by removing the obstruction, as much as he had the right of resisting an actual trespass upon the land. The action, however, is not an action of waste against the tenant, but an action on the case against the person who diverted the stream. It is further argued, and it seems to be the argument most relied upon in support of the Plaintiff's right to recover the whole, that he is liable to pay the additional rent for the ground dug up by the Defendant, though it was done without his consent, and against his will, and he received no benefit from it. And therefore it is said, that the lessor loses nothing, and the Plaintiff, who must pay him the increased rent, has a right to

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stand in his place, and recover the whole damages from the Defendant. If this were so, it might still be doubted, whether in a general action of trespass, alleging no special damage, any increase of damages could be given to the Plaintiff, by reason of his liability to pay money under a particular contract; but, without resting on that objection, I think the foundation of the argument totally fails, being of opinion, as I have before expressed myself, that the Plaintiff, in respect of what the Defendant has done, is not liable to any payment under his covenant in the lease. The case is not within the terms of the covenant. The Plaintiff has not directly or indirectly done the act, or received the benefit, from whence the obligation to pay is to arise. To supply, however, the defect of the language of the covenant, recourse is had to a supposed rule in actions of waste, namely, that where the waste is committed by a stranger, it is presumed to be done by him in collusion with the tenant, and that for that reason the tenant must always be charged in the proceeding with having committed the waste himself. But I apprehend that this argument cannot possibly apply in this case. In the first place, I think the law of the action of waste attaches upon no part of the transaction. The Plaintiff has not been rendered liable to such an action. His lessor could not proceed against him in that action, without stating that the waste was committed by the Plaintiff himself; against which charge, the lease that gives him the authority, affords a complete defence. I apprehend too, that this supposed presumption does not take place even in the action of waste itself. I find no traces of it in any of the books. The act indeed is considered as the act of the tenant, but the reason assigned is, that he may withstand the commission of waste, *et qui non obstat quod obstare potest, facere videtur*. The situation of the tenant

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is extremely analogous to that of a common carrier; to prevent collusion, (and not on presumption of actual collusion,) both are charged with the protection of the property intrusted to them, against all but the acts of God and the king's enemies: and as the tenant in the one case is charged with the actual commission of the waste done by others, so in the other case the carrier is charged with actual default and negligence, though he loses the goods by a force that was irresistible, or by fraud, against which no ordinary degree of care and caution could have protected him. But supposing that collusion must necessarily be presumed in the action of waste, the presumption must stop there. If it were otherwise, the tenant would be without redress against the actual wrong doer, by whom he has been subjected to a forfeiture and damages. There is no doubt that he has a remedy against him by action of trespass; but if the presumption continued, the collusion established by it would amount to a licence, and afford a defence to the action. It would be still more extravagant to set up the presumption again in an action of covenant, to wrest and pervert the plain meaning of unambiguous words, and especially in a covenant, one of the effects of which is, to prevent any liability to the action of waste for the species of injury which the land has received. There is no other rule, I think, to construe the covenant by, but the obvious intention of the parties, and the plain meaning of the language they have used: and the substance of their agreement is no more than this, that if the Plaintiff, in his business of brick-making, thought fit to use the materials that were to be found in part of the farm he took in lease, he should be at liberty so to do, paying a fixed price for what he took and had the benefit of. That price he covenants to pay; but I do not know by what law we are authorized to extend this covenant, so

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as to make him responsible under it for what has been taken by a stranger, by trespass, and against the Plaintiff's will, and for which the Plaintiff has brought an action of trespass. In what I have said upon the proper estimate of the Plaintiff's damages, I have not noticed several circumstances and distinctions that might require attention in making the estimate: for instance, the subversion of the soil, from its effect upon the produce and future cultivation of the ground during the term, was an injury to the Plaintiff's interest as tenant, for which, if the case rested there, proportionate damages ought to be given him: but if he goes for the greater damage, in respect to the profits he might have made of the brick earth, he must give up the other damages, because he himself could not have obtained that greater profit, without doing the same damage to the ground with respect to the purposes of agriculture. But I have only noticed the principal object of damages, that being sufficient to dispose of the legal question before us; and upon that question, my opinion is, that the Plaintiff has had damages assessed to him, which belonged to another person, his lessor, and therefore I think the proceedings upon the inquiry ought to be set aside.

HEATH J. In order to ascertain the measure of damages to which the Plaintiff is entitled, it is necessary to ascertain the nature and quality of the estate and interest which he has in the land in question. It is common learning, that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land in lease, by whomsoever it may be committed. If a general or a partial permission be given to the lessee in the instrument creating the estate, to commit waste, he is so far a tenant without impeachment of waste. Such permission vests the property of what

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what is the subject of waste in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals. In cases of bankruptcy the present lessee would be considered as the purchaser of so much soil. So, if he had stipulated for any quantity of timber growing on the land, with a liberty of felling the same at a certain price, can there be a doubt but he must be considered as the purchaser of such timber? It hath been urged, that no certain portion of the land has been set out:—the soil taken must be considered as the property of the Plaintiff, or at least he has a right to elect that land out of which it is taken. The proof is this, that if the landlord had brought an action of waste against the Plaintiff, on account of the removal of this soil, he could not have protected himself in any other manner, than by insisting on the articles, and his election. The tortious act of another may give the party injured a right either to affirm or disaffirm the act, as it shall the best suit his interest, and as he shall be advised. If the Defendant be only to pay the increased rent, it is giving him, who is a wrong-doer, all the benefit and advantage of the Plaintiff's contract. To consider the landlord's right to recover. The cases between landlord and tenant, where the tenant has no right to commit waste, are not applicable, because the soil and the trees are merely committed to the possession and custody of the tenant. Such custody and possession is merely fiduciary. In what respect can the lessor here recover damages? Not for the removal of the soil, for that is sold to another; but only for any damage possibly done to the inheritance, if such there be, in the manner of the excavation. But such damages are distinct from those demanded by the Plaintiff in the present action. If the lessor cannot recover damages for this excavation, the lessee may recover them. So I think, that the right of

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the Plaintiff to recover these damages, is proved directly, by the injury he has sustained, and indirectly, because the landlord cannot recover them; and it is clear that the one or the other of them is entitled to them. No special damage could be set forth, because the damage is immediate, direct, and unconnected with any other damage. For these reasons I think that the damages have been properly assessed.

MANSFIELD C. J. I am of the same opinion with my brother *Heath*. I concur in far the greater part of the law stated by my brother *Chambre*; but on the frame of these covenants, I think the case tolerably clear in favour of the measure of damages adopted on this occasion. In effect and substance this is a sale of brick earth by the lessor to the lessee. The *habendum* in the lease is for 21 years, at the rent of 1075*l.* per annum. I take it for granted, as it was said in the argument, and indeed it is what is expressed afterwards in the lease, that the price of half an acre per annum for 21 years, is calculated in the rent: the *habendum* is with full power to take this brick earth. There is a covenant that the lessee should have, take, and enjoy out of certain grounds containing 38 acres and an half, with free right annually to dig to the depth of 20 feet from the plane surface, one half acre, for the purpose of obtaining thereout brick earth to be made into bricks or tiles, or otherwise to be applied to such purposes as the lessee should think proper. The lessee covenants not to dig more than half an acre in a year, or otherwise to pay 375*l.* for every further half acre, being after the rate that the whole brick earth was thereby sold or intended to be sold for. I think the lessee, after these words, had the same right as the lessor. What more right could any man have in brick earth, than to dig, take, and sell it? Then there are the words

"which

"which the whole earth was sold or intended to be sold for." The lease amounts to an absolute sale of the whole brick earth, but the tenant was not to pay for the whole, unless he used the whole.* Twenty-one half acres are sold absolutely. The lessor could now take no brick earth; that would infringe the power of the lessee: as against him, the lessee might now say the brick earth was all his. If he took more than half an acre, he was to pay the additional price. If the lessor had taken this earth, even to the value of an hundred thousand pounds, the lessee would have had a right to recover against him the full value of it. Then why not against a stranger? It is true, that in an action against the lessor, the lessee must either have allowed the stipulated price by way of deduction from the damages, or it might have been recovered against him in a cross action. It is said he had not elected this spot; but surely at the moment that a stranger began to dig, he might say, this is the earth I intended to dig; and by the affidavits it appears that this was very valuable earth. When it was dug by a stranger, had not the lessee a right to come and take it away, and use it? And if so, has he not a right to make the stranger pay for it? The consequence of this taking by a stranger, and of this action against the stranger, is, as between the lessee and the lessor, it must be taken to have been dug by the lessee; if this, and what himself had dug, did not together exceed the half acre per annum, there is nothing to pay; but if it exceeds that quantity, the lessee must pay the stipulated rent for the surplus. In such a case as this, would the lessee be answerable in waste to the lessor for brick earth dug by a stranger? On a general covenant not to dig brick earth, I should think it a doctrine hard upon the lessor, to say that if a stranger took the earth, the lessee should not be liable on this covenant. It is held in 2 *Inst*. 145, 6. 303. *F. N. B.* old edit. 60. new edit. 137. that the lessee shall

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be charged with waste committed by a stranger. In *Co. Lit.* 54. *a.* even infants and femes covert, tenants, are held by Lord *Coke* answerable for the acts of a stranger. So, of tenant by the courtesy or in dower, 2 *Rol. Abr.* 821. 9. If the law were not so, there would be no protection to a lessor, where he lives at a distance from his estate. This is not the case of a sack full of earth stolen by night, but many hands, and carts, must be employed, and the tenant must necessarily know it: when the lessor comes to see his estate, and finds the soil gone, it is impossible that he should know who took it. Suppose on a covenant not to take brick earth, the lessor sues, finding a quantity gone; is it an answer to say, "I did not take it; a stranger, a beggar, took it: resort to him?" The law authorizes the tenant to use force in order to resist the taking; and if that force is resisted by force, the law will not presume that the law is so feeble as not instantly to repel it, and prevail. Such a covenant would be of no value whatever if this were so. Lord *Coke*, 2 *Inst.* 303. says, the lessee shall answer for the waste done by any stranger: for he in the reversion cannot have any remedy but against the tenant, and the tenant shall have his remedy against the wrong-doer, and recover all in damages against him, and by this means the loss at last shall light upon the wrong-doer. If the lessee gave permission to a stranger to dig, no doubt it would be the act of the lessee, and he would be bound to pay the lessor the stipulated price. Then what is the difference between his agreeing to it, and his standing by while the stranger takes it. It is not necessary to prejudge the question whether the lessor can sue in this case; but I have great difficulty in finding out how the lessor can be injured; for if the Plaintiff had contracted to sell this earth to the Defendant, and had received the full value for it, must not he have paid his landlord the increased rent? How does it differ whether he extorts the

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the price by an action, or receives it by voluntary payment? If the lessee may take it, as against the lessor, and recovers damages as against a stranger, although the stranger took it in the first instance against the will of the lessee, he cannot say he does not so far confirm the act of the stranger, that he ought to pay the lessor for it. He has in fact the brick earth, since he is paid for it in damages in an action; and he could not avoid paying on his covenant, for any brick earth beyond the half acre, of which he has the advantage. Therefore, if the lessor has any right, it must be for mere nominal damages, and I cannot say this verdict is wrong; consequently the

Rule must be discharged.

REGULÆ GENERALES.

IT IS ORDERED, That from henceforth, in all special arguments in this Court, the Exceptions which are intended to be insisted upon shall be marked in the margin of the Books to be delivered to the respective Judges.

J. MANSFIELD.
J. HEATH.
A. CHAMBRE.

IT IS ORDERED, That from and after the last day of this term no Defendant shall be holden to special bail in any action of trover or detinue, unless by an order of the Lord Chief Justice or one other of the Judges of this Court.

J. MANSFIELD.
J. HEATH.
A. CHAMBRE.

1809.

Hilary Term.

IT IS ORDERED, That from and after the first day of next *Easter* term, in every action to be commenced by original writ of *quare clausum fregit*, there shall be written or printed under the summons to be served by the sheriff's officer on such writ, a notice in the following form; viz.

" *A. B.* [*Defendant's name*] You are served with " this summons to the intent that you may by " your attorney appear in His Majesty's Court of " Common Pleas at *Westminster* at the return " thereof, being the [*the day of the month and date* " *of the year*] in order to your defence in this " action."

AND IT IS FURTHER ORDERED, That upon every *distringas* to be issued in default of the Defendant's appearance to such *quare clausum fregit*, there shall at the time of the execution of such *distringas*, be served by the sheriff's officer on the Defendant, if he can be met with, or if not, left at the dwelling-house of the Defendant, or place where such *distringas* shall be executed, a written or printed notice, in the following form; viz.

" In the Common Pleas—Between *A. B.* Plaintiff " and *C. D.* Defendant [*the Names of the Parties.*] " Take notice, That I have this day distrained " upon your goods and chattels for the sum of " forty shillings, in consequence of your not hav- " ing appeared by your attorney in His Majesty's " Court of Common Pleas at *Westminster* to a writ " of *quare clausum fregit*, returnable there on the " [*state the day and year:*] And that, in default " of your so appearing to the present writ of *dis-* " *tringas* at the return thereof, being the [*state* " *the day and year*] you will be liable to be dis- " trained upon for such further sum as the said " Court shall be pleased to order. Dated, &c. " [*signed with the officer's name.*] To [*C. D.*] the " the above named Defendant."

J. MANSFIELD.
J. HEATH.
S. LAWRENCE.
A. CHAMBRE.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Forty-eighth Year of the Reign of GEORGE III.

1808.

MEMORANDUM.

ON the first day of this term, Mr. Justice LAWRENCE, who had resigned his seat in the Court of King's Bench, took his place as one of the Judges of this Court, in the room of Mr. Justice ROOKE, deceased. And in this term JOHN BAYLEY Esq. Serjeant at Law, was appointed one of the Judges of the Court of King's Bench, in the room of Mr. Justice LAWRENCE, and was knighted.

CLEMENTS v. LAMBERT.

May 5. 1808.

After an easement has been extinguished by unity of possession, a new easement is not created by a grant of a messuage and land with common appurtenant: Though those who have occupied the tenement since the extinguishment have always used common therewith. Otherwise, if it had been a grant of all commons used therewith.

THE Plaintiff declared that he was lawfully possessed of a messuage and ten acres of land, and by reason thereof was entitled to common of pasture upon *Stockwell* common for all his commonable cattle levant and couchant, as *belonging and appertaining* to his said messuage and

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CLEMENTS v. LAMBERT.

land, with the appurtenances, and that the Defendant wrongfully erected divers cottages and buildings in and upon the said common, and inclosed parts of the common, whereby, &c. Upon the trial of this cause at *Croyden* summer assizes 1807, before *Heath* J. the Plaintiff proved 60 or 70 years user of the common by the inhabitants of his house, the *Swan* Inn. The Defendant proved that in 1781 *Edward Thornycroft*, from whom he derived title to himself, was seised in fee as well of the *locus in quo*, being part of the waste of the manor of *Stockwell*, as of the Plaintiff's house and land, and in that year conveyed the latter to one *Robertson*, (under whom the Plaintiff derived title), together with all *commons*, common of pasture, advantages, hereditaments, and appurtenances whatsoever, *thereto belonging* or in any wise *appertaining*. *Heath* J. thought the ancient common extinguished by unity of possession in *Thornycroft*, and that this deed did not amount to evidence of a new grant of common. A verdict however passed for the Plaintiff, with liberty for the Defendant to move on this point. And *Shepherd*, Serjt. having in *Michaelmas* term last obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Best, Serjt. now shewed cause. The cotemporaneous usage for more than twenty years from the date of the Plaintiff's conveyance up to the present time, coupled with the words in the deed, are equivalent to a grant of a new right of common. Where the usage has coincided with one construction of the deed, the Court will not adopt any other construction. (*a*)

Shepherd, Serjt. *contrà*. This case is not distinguishable from three or four cases to be met with in the books. The Plaintiff declares generally that the building of these houses has narrowed the enjoyment of his

(*a*) *Quære*, Whether this proposition is not too extensive. *Vide Doe ex dem. Colclough* v. *Johnson*, 1 *Esp.* 460, where Lord *Kenyon* C. J. is said to have revolted at the idea that a tenant could make his landlord a trespasser by implication. But it did not appear that the landlord in that case was seised of the waste.

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CLEMENTS v. LAMBERT.

right of common. Although it is not necessary that he should nicely set out his title in his declaration, he must shew some title in evidence. The deed of 1781, which conveys the house to *Robinson*, under whom the Plaintiff holds, confines his title to the claim of common appurtenant. But at the date of that conveyance, there was no common appurtenant in existence; for it had been extinguished by unity of possession. *Grimes* v. *Peacock*, *Bulst.* 17. and the words, "belonging or usually appertaining," will not create a new right of common. The user is of no importance. In the case of *Saunders* v. *Oliffe*, *Moor.* 467. there was user of the common, but it did not avail. While the lord of the manor was tenant in fee of this land, he might permit his lessee for years to turn out cattle on the waste, but that would not operate as a grant of a right of common. In the cases of *Bradshaw* v. *Eyr*, *Cro. El.* 570. and *Worledg* v. *Kingswell*, 2 *Anderson*, 168. S. C. *Cro. El.* 794. the common was adjudged to be revived by the words "*cum eodem messuagio usitatarum*," coupled with proof of cotemporaneous user, but it was held that without those words a common would not have been created. It is immaterial whether the claim is put on the record in the shape of pleading, or only shewn in evidence. The Plaintiff here avers this right generally, as he may do, but the criterion of his proving it, is, whether the evidence, if put on the record in the shape of a justification to a trespass, would fully support his right. The difference between a declaration and a justification, is this, that a declaration states only the result of law, and entitles the plaintiff generally; a justification states the steps by which that result is obtained.

MANSFIELD C. J. This is not in a legal sense right of common appurtenant. We cannot say, upon looking at this deed, that a right of common passed by it.

The other Judges concurring, Rule absolute.

1808.

May 5.

BRYAN on the Demise of CHILD v. WINWOOD.

A lessee for lives cannot acquire a fee by encroachment upon the waste adjoining the land demised, though accompanied by 30 years uninterrupted possession. But it shall be intended that he incloses the waste in right of the demised premises, for the benefit of the lessor after the term expired.

More especially if his lessor be seised in fee of the waste.

Acts exercised in assertion of right upon one part of a waste, are admissible in evidence against occupiers of another part of the same waste.

THIS was an ejectment brought to recover possession of a messuage called the *Honeyhouse*, with the garden orchard and new inclosure, and also of a second parcel of land newly inclosed from a waste called *Alton Woods*. At the trial before *Graham* B. at the last summer assizes for the county of *Worcester*, the Plaintiff's lessor, in order to entitle himself to the manor and waste in question, offered evidence that he and the freeholders of the manor had prostrated encroachments on this waste, and also that several persons had paid quit rents to himself for similar encroachments on the same waste. On the part of the Defendant, it was in evidence, that the person under whom the Defendant claimed, had about 100 years ago inclosed three quarters of an acre of *Alton Woods*, and built thereon the messuage in question: that many years after, and after his death, in 1744, his son accepted a lease of those premises from the person under whom the Plaintiff's lessor derived title, at one shilling rent, for three lives, the last of which expired about seventeen years before this ejectment brought: that above thirty years before this ejectment brought, the tenant, without the permission of the lord, inclosed another piece of the waste, divided from the demised premises by the high road, which he always occupied, without paying any acknowledgement. The one shilling rent was never paid. But some evidence was given on the part of the Defendant, though not wholly uncontradicted, which tended to shew that the lord of the manor had alienated this part of the waste to the commoners, under an agreement that he might inclose the residue, and enjoy it in severalty, which agreement was supposed to have been confirmed by a decree in equity. The counsel for the Defendant objected to the admission of the evidence of acts done

by

1808. CHILD v. WINWOOD.

by other freeholders; and also contended, that even if the Plaintiff were entitled to recover the premises contained in the lease, he could not recover the land which was last inclosed. *Graham* B. admitted the evidence, and directed the jury, that if the second new inclosure was made subsequently to the date of the lease, it must be presumed, (and more especially if they found the soil of the waste to be the property of the Plaintiff's lessor,) to have been taken in with the consent of the lessor, in right of the demised premises, for the benefit of the lessor, after the end of the lease. The jury found a verdict for the Plaintiff for the whole of the premises.

Williams, Serjt. had in a former term obtained a rule *nisi* for a new trial, partly upon objections to the evidence which had been admitted, but principally upon affidavits which stated that the persons under whom the Defendant claimed, had been induced to accept the lease for three lives, by a misrepresentation of the extent to which it would confirm their prior claim to the premises, against some other persons claiming under the same ancestor who made the first encroachment.

Bayley, Serjt. in shewing cause, contended that the Defendant was precluded by the lease from contesting her landlord's title, according to the case of *Barwick* v. *Thompson*, 7 *T. R.* 488. He also observed that if a tenant holds land and incloses part of the adjoining waste, he thereby attaches it to the estate which he holds, and that his subsequent occupation, though continued for more than thirty years, cannot vary the right to it.

Williams, contrà, observed that in *Barwick* v. *Thompson* the lease was still subsisting at the time of the ejectment brought, and contended that according to the doctrine

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recognized in the case of *Blake* v. *Foster*, 8 *T. R.* 496. the estoppel determined by the expiration of the lease.

The Court thought that the affidavits suggesting circumvention were not sufficiently positive; and observed, that if the Defendant could substantiate those facts, she might recover in another ejectment: and without intimating that they saw cause to be dissatisfied with the verdict, or the direction of the Judge, on any other of the grounds taken, they

Discharged the Rule.

May 5.

FINLAY *v.* SEATON.

Neither a certificate from the Judge, nor a suggestion on the roll, is necessary to entitle a Defendant to double costs, under 11 *G.* 2. *c.* 19. *s.* 21.

TRESPASS for seizing a cable. The Defendant pleaded the general issue, and upon the trial proved in evidence that he had taken it as a distress for rent due from a third person, on whose premises it had been placed by the Plaintiff. Double costs having been taxed for the Defendant under the directions of the statute 11 *Geo.* 2. *c.* 19. *s.* 21. *Vaughan*, Serjt. had obtained a rule *nisi* that the prothonotary might review his taxation. Being called upon to support his rule, he contended that to authorize the allowance of double costs, it was necessary, either that the Defendant should previously obtain from the Judge who tried the cause, a certificate that the case came within this act; or that a suggestion should first be entered on the record, whereby the nature of the action might appear. He urged, that the prothonotary could not again try the cause at the taxation of costs; he could only look at the roll; and upon the roll the circumstances of the cause of action do not appear. If a certificate was necessary, it was now too late to obtain it,

according

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FINLAY
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according to the doctrine laid down in the case of *Grindley* v. *Holloway*, 1 *Doug*. 308, which arose on the statute 7 *Jac*. 1. *c*. 5. He also contended, that the owner of the cable not being the lessee, this could not de considered as a question between landlord and tenant.

MANSFIELD C. J. This act gives the Judge no authority to certify, therefore the omission to apply to the Judge cannot in this case deprive the landlord of his remedy. There is no question but that the double costs are to be paid: the only remaining question then is, whether a suggestion upon the record is requisite to shew on what ground they are given. But it does not appear on the record that the Defendant has double costs; therefore it is not necessary to suggest on the record, that there is a cause for double costs. It is not necessary that the judgment should specify more than that a certain sum is allowed for costs, and then all will be right; and it is admitted that no precedent of such a suggestion is to be found. No fact was in dispute between the parties before the prothonotary; it was not denied that the action was brought against the landlord for a distress, so that the prothonotary had sufficient information for his guidance.

HEATH J. observed, that in cases on the small debt acts the courts have allowed a suggestion to be made on the record, although no suggestion is given in the acts.

LAWRENCE J. [Adverting to *Vaughan's* last argument.] This case clearly comes within the act, the purpose of which is to enable landlords the better to recover their rents.

Shepherd, Serjt. *contrà*. Rule discharged.

1808.

(IN THE EXCHEQUER-CHAMBER.)

May 11.

MORRIS and Wife *v.* NORFOLK and Another.

If a declaration against baron and feme for a debt of the feme contracted before marriage, allege a promise of the feme made after the marriage to pay the debt, it is bad.

THIS was a writ of error, brought to reverse a judgment of the Court of King's Bench. The Plaintiff below stated in the first count of his declaration, that before the intermarriage of the said *Francis*, the Defendant below, with the said *Mary* his wife, they the said *Francis* and *Mary*, then *Mary Lovet*, made their certain joint and several promissory note in writing, and delivered the same to the said *Benjamin* and *John*, the Plaintiffs below, by which said note they jointly and severally promised to pay to the said *Benjamin* and *John* the sum of twenty pounds, for value received, whenever afterwards the said *Francis* and *Mary* should be severally thereunto requested, by means whereof they and each of them became liable to pay to the said *Benjamin* and *John* the said sum of money in the said note specified, whenever afterwards they or either of them should be thereunto requested. And *being so liable, they the said* Francis *and* Mary, afterwards, and *after the intermarriage of the said* Francis *with the said Mary*, and before the payment of the said sum of money in the said note specified, undertook to pay the same upon request. The second and third counts averred, that the said *Mary*, before her intermarriage with the said *Francis*, was indebted to the said *Benjamin* and *John* in the sums of twenty pounds for so much money by them, before that time paid, laid out and expended for the use of the said *Mary*, and twenty pounds for so much money by the said *Mary* before that time had and received for the use of the said *Benjamin* and *John*: and that, *being so indebted*, they the said *Francis* and *Mary*, *in consideration thereof*, afterwards and

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MORRIS and Wife v. NORFOLK and Another.

and *after her intermarriage* with the said *Francis*, undertook to pay the same upon request. The breach stated, that they had refused to pay, although so to do the said *Mary* before her said intermarriage, and the said *Francis* and *Mary* since, had been often requested: but that to pay the same the said *Mary* before her said intermarriage, and the said *Francis* and *Mary* since, had wholly refused, &c.

The Plaintiffs assigned for error, first, That the promises and undertakings of the said *Francis* and *Mary* in the said declaration mentioned, whereupon the said *Benjamin* and *John* had recovered their damages, were, as to the said *Mary*, void in law; for that the same were in and by the said declaration alledged to have been made by the said *Francis* and *Mary*, after the intermarriage of the said *Francis* with the said *Mary*; and that the said *Mary* could not, after her intermarriage with the said *Francis*, legally make any promise. 2dly, That judgment was given for the said *Benjamin* and *John* to recover their damages upon *all the promises* and undertakings in the said declaration mentioned; whereas in the second and last counts of the said declaration, it was alleged, that the said *Mary*, before her intermarriage with the said *Francis*, was indebted to the said *Benjamin* and *John* in the sums therein respectively mentioned; and that *being so indebted*, they the said *Francis* and *Mary in consideration thereof*, afterwards, and *after her said intermarriage*, undertook and promised the said *Benjamin* and *John* to pay to them those respective sums of money upon request, but no sufficient or adequate consideration was stated in those counts for the promises and undertakings of the said *Francis* in those counts mentioned. 3dly, That there was a misjoinder of counts; the Defendants in error having declared against the Plaintiffs in error as joint makers of the promissory note mentioned in

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in the first count; and the debts mentioned in the two last counts, which it was therein alledged that the said *Francis* and *Mary* promised to pay, being the separate debts of the said *Mary*, and contracted by her before her marriage with the said *Francis*.

The case was argued in *Hilary* term last by *Peake* for the Plaintiffs in error. If the promise of the *feme covert* alleged in the first count is held good, she is permitted to promise to discharge the several debt of her husband, contracted before his marriage upon this note. But it is not necessary to argue from this monstrous consequence, for it is well known that a married woman can enter into no contract at all. *Bidgood* v. *Way and wife*, 2 *Bl.* 1236. was an action brought by the husband and wife jointly, for use and occupation, and money had and received. *Skynner* C. B. laid it down that no contract could be made with a married woman, and that no promise, either express or implied, gave any interst to her. If the wife in that case could not, after marriage, contract that the Defendant might occupy her land, neither can she make such a promise as is here stated. *Hill* v. *Hill*, 2 *Str.* 1094. An action was brought by the husband and wife for wages earned by the wife before marriage: it was attempted to give in evidence an admission made by the wife after marriage, that she had received 20*l.* *Pratt* C. J. held that it was not admissible against the husband and wife. *Alban* v. *Pritchett*, 6 *T. R.* 680. is a still stronger case; for that was an action brought by the wife as executrix; yet her declaration, affecting her husband's rights, although arising *jure uxoris*, was held to be inadmissible. 2. The common form of declaration in these cases is, to allege that the wife before marriage became indebted, and being indebted, promised to pay, and then intermarried; and upon the intermarriage the liability of the husband arises, and upon that

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that liability his subsequent promise is properly alleged. But in this instance the second and third counts state a promise made by the husband without shewing any consideration for it. It is neither alleged that the wife promised to pay before marriage, nor that the husand was liable after marriage. If a wife dies, the husband ceases to be liable for her debts contracted before marriage. 1 *Ro. Ab.* 351. *G.* 2. *F. N. B.* 120.; therefore it must appear on the face of the declaration, that his promise was made during his liability, and not after it had ceased. 7 *T. R.* 349. *Mitchinson* v. *Hewson*. *Indebitatus assumpsit* for work and labour performed for the Defendant's wife before her intermarriage; and the declaration was held bad, because it stated the debt of the wife, and the promise of the husband, without any consideration moving to the husband for that promise; and although that case appears to have been decided on the ground that the wife had been improperly omitted, who is here made a party to the suit, the whole of the argument on both sides turned upon the objection arising from the want of some new consideration to sustain the action against the husband. 3. The husband might be sued alone on the cause of action alleged in the first count; he could only be sued jointly with his wife on the cause of action alledged in the two last counts. This was so held in the case of *Rose* v. *Bowler*, 1 *H. Bl.* 108. 2 *Wils.* 227. *Swithin* v. *Vincent* and *Swithin* v. *Vincent and wife*: the Court refused to consolidate the two actions, because the wife was not liable for words spoken by her husband. So, neither here is the wife liable on the note of her husband.

Denman for the Defendants in error. The cases of *Hill* v. *Hill*, and *Alban* v. *Pritchett*, are not inconsistent with this judgment. The criterion of the propriety of this judgment is, whether the action would survive against the

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the wife solely, if her husband were to die pending the suit. Undoubtedly it would survive. Even the case of *Mitchinson* v. *Hewson* proves that the wife must be sued where the debt accrued before marriage: and this declaration only states the continuation of the joint liability of husband and wife which existed before the marriage. The wife's promise is not in all cases a nullity: in some cases it must necessarily be valid, for if a debt is barred by the statute of limitations, there a subsequent promise made by the husband and wife will take it out of the statute; if this were not so, in the event of the husband's dying before the wife, the debt would be lost, and there would be a complete failure of justice; for the promise of the husband alone would bind himself during their joint lives, but without some new consideration personal to himself, such as would make the action survive against his executors on his own death, his sole promise would not bind himself after his wife's death; nor would it bind her after his decease; and as it is clear that the promise of the wife alone, made during coverture, will not revive the debt; in all cases of marriage, where the debt is more than six years old, it would be impossible during the husband's life so to revive it that it might survive against the wife, unless their joint promise would suffice. 2. All the books agree that the husband shall be charged with his wife's debts incurred before coverture. And the practice certainly has prevailed, that, in an action against the husband and wife jointly, the husband may be arrested and detained till he has put in bail for both. This is founded on his liability; an actual promise to pay his wife's debts is not necessary. 3. There is no misjoinder of counts. It is stated in the first count, that the wife was severally liable before marriage, and in the two last, that she was solely liable before marriage; and since it appears by the declaration, that the husband is in each count, sued in respect of his wife for a debt due from

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from the wife before marriage, the Court will support the judgment, by rejecting that part of the count which alleges the joint contract; as was done in the case of *Rees* v. *Abbot*, 2 *Cowp.* 832. The joining of these counts on the record proves that the Plaintiffs have made their election to sue the Defendants on the separate claim against the wife.

Peake in reply. If immediately before the expiration of six years the husband promises to pay, in consideration of forbearance, that is a good consideration, personal to himself, and his promise will, after his wife's death, bind himself and his executors. It is true, as the argument states, that if he promises after the six years expired, his promise will bind himself only during the joint lives of himself and his wife; and that in neither case could it, after his decease, be given in evidence against her. But although in the latter case the action would not survive against either: not against the wife after the husband's decease, because during his life she was incompetent to contract or promise; and he is incompetent to bind her after his decease; nor against him, because there is no new consideration to extend his liability beyond her life; yet it does not follow that a joint promise would be more effectual. If such a promise would be valid during his life, it could be given in evidence against the wife after his death: and much greater inconveniences would accrue from this consequence, than from the other; for the husband's influence might often be perverted to oppressive purposes, as in favour of creditors against the wife.

MANSFIELD C. J. desired to be informed whether any cases were to be found, in which declaration on a promissory note had omitted to state any *assumpsit* besides that which was contained in the tenor of the note.

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Starkey v. *Cheesman*, 1 *Salk.* 128. S. C. *Carth.* 509. was mentioned as in point. *Risley* v. *Stafford*, *Palm.* 312. and *Aleberry* v. *Walby*, 1 *Str.* 229. which cites 1 *Sid.* 224. were also cited.

On this day, *the Court*, without adverting to the two last objections, gave judgment for the Plaintiff in error upon the first.

Judgment reversed.

May 17.

HEFFORD *v.* ALGER.

The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the costs of the suit on the bond.

If the Plaintiff in replevin is nonsuited, the Defendant is not bound to have his damages assessed by the jury under *st.* 17 *Car.* 2. *c.* 7. or to take the earliest moment to prosecute his writ *de retorno habendo*.

And he may again distrain the same goods for rent subsequently accrued, previously to executing his *retorno habendo*, without waiving his action against the sureties in the bond.

THE Plaintiff having in *January* 1807 distrained the goods of *Bride* his tenant, for rent due at *Christmas* 1806, *Bride* replevied, and the Defendant and his brother became the sureties in the replevin bond. *Bride* sued in replevin, and was nonsuited. He afterwards became a bankrupt, and his assignees on the 30th *December* 1807 were proceeding to sell his goods, when the Plaintiff put in his claim for a year's rent, accrued since the rent distrained for, which the assignees undertook to pay, on his permitting the sale to proceed. The avowant had sued out his writ *de retorno habendo* on 28th *November* 1807, and on 26th *January* 1808 he delivered it to the sheriff, who thereupon returned an eloignment; upon which he took an assignment of the replevin bond, and brought an action thereon and delivered separate declarations, and proceeded to sign judgment, and to sue out separate writs of execution against the Defendant and the other surety, for 50*l.*, being the amount of the penalty in the replevin bond, and 10*l.* 1*s.* being the separate costs of each

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Defendant. He delivered the writs to the sheriff, with directions not to levy more than 96*l.* in the whole; being the amount of the rent originally distrained for, and the costs in both the actions; however, upon some communication taking place between the parties, the Plaintiff received of the Defendants under this execution the sum of 70*l.* 2*s.* only, consisting of 50*l.* the penalty in the bond, and 20*l.* 2*s.* for the costs awarded against both these Defendants; but without abandoning his supposed claim for the amount of the rent and all the costs.

Marshall Serjt. had on a former day obtained a rule *nisi* for returning to the Defendants the money so received; upon the ground that the plaintiff having neither proceeded on the statute to value the distress, nor availed himself of the opportunity which he had of retaking *Bride's* goods under his writ of *retorno habendo*, could not, after consenting to the sale by the assignees, now resort to the sureties in the replevin bond, for any sum whatever.

Vaughan Serjt. in shewing cause against this rule observed, that the rent which the assignees undertook to pay, was not the rent orriginally distrained for, but was rent subsequently accrued. He supposed that the Plaintiff, having obtained separate judgments, was entitled to sue out a separate execution against each for 60*l.* 1*s.*, the penalty and costs, which amounted to 120*l.* 2*s.* in the whole, and that therefore he was well entitled to levy the sum of 96*l.* which he claimed. [*Lawrence* J. observed, that there was only one penalty in the bond, and therefore under the two executions the plaintiff could levy only the single sum of 50*l.*, and the costs of suing both sureties on the bond; and he had already received that amount.] *Vaughan* suggested that on the authority of *Waterman* v. *Yea*, 2 *Wils.* 41. the sureties are liable to a greater extent than the penalty in the bond. In the

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case of Lord *Lonsdale* v. *Church*, 2 *T. R.* 388. it was held that an obligee might recover to a greater amount than the penalty.

Marshall, *contrà*. The Plaintiff in replevin being nonsuited, the jury then sworn ought to have assessed the damages and the value of the goods. But although that course was not pursued, yet inasmuch as the plaintiff could at all times have had his writ *de retorno habendo* at his pleasure, he ought to have retaken the goods in the hands of the assignees. The case of *Waterman* v. *Yea* has been overruled in that of *Evans* v. *Brander*. 2 *H. Bl.* 547.

MANSFIELD C. J. The only question is, whether by this proceeding with the assignees, the Plaintiff has waived his right to sue on the replevin bond. If I could have a doubt on that subject, the defendant by the terms of the negociation, which, according to the affidavits, took place when the money was paid, has admitted the right of the plaintiff to the penalty in the bond. The case of Lord *Lonsdale* v. *Church*, has been overruled by the subsequent case of *Wild* v. *Clarkson*, 6 *T. R.* 304. In the common case of a bond in a penalty, conditioned to pay a smaller sum, it was held very reasonable to calculate interest on the sum secured by the condition; but when the principal and interest equal the amount of the penalty, the interest must thenceforth cease; therefore, in a court of equity, a note of hand is a better security: I was of counsel in the case of *Knight* v. *Maclean*, which was argued before Lord *Thurlow*, chancellor. 3 *Bro. Cha. Ca.* 496. in which this doctrine of *Buller* J was cited and very much discussed.

HEATH J. This point is well settled. There is no ground for the motion in any point of view.

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CHAMBRE J. The Plaintiff was not entitled in respect of the first distress, to stop the sale by the assignees. At that time he had no lien whatever on the goods in respect of the first distress. He had a right to distrain again for the subsequent rent; that right he was at liberty to waive, and in respect of it to consent to the sale of the goods.

Rule discharged.

MANN v. CALOW and Another.

May 19.

In *scire facias* against the bail, if there be a failer of the record through a misprison of the officer of the court, the Court will permit the recognizance to be amended.

THIS was a *scire facias* against the bail on a recognizance which had been taken in an action of debt upon a judgment for 300*l*. The declaration was in the usual form; and supposed the obligation of the recognizance to be, that the bail should satisfy the "debt and damages." But upon a plea of *nul tiel record*, the recognizance appeared to be for payment of the "damages" only, upon this failer of the record, *Marshall* Serjt., upon the authority of *Rastall* v. *Straton*, 1 *H. B. C.* 49. and *Petrie* v. *Hannay*, 3 *T. R.* 659. obtained a rule *nisi* for amending the entry of the recognizance, by inserting before the word "damages" the words "the debt and," contending that this was a mere misprision of the officer, and that the Court was empowered by *st.* 8 *H.* 6. *c.* 15. to amend the misprisions of their clerks.

Runnington and *Vaughan* Serjts. *contra*, shewed cause *instanter*. They endeavoured to distinguish this from the cases cited; first, because this was not an attempt to amend the proceedings, but to amend the record itself; and next, because neither of those cases was the case of a proceeding against the bail, and it was a principle in the practice of this court, not to permit amendments in proceedings against bail, who must be presumed to be conu-

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sant of the mistake, and to rely on it for their defence; otherwise, it must be supposed, that they would have surrendered the defendant. *Grey* v. *Jefferson*, 2 *Str.* 1165. *Hillier* v. *Frost*, 1 *Str.* 401: In the case of *Fulwood* v. *Anniss*, 3 *Bos.* and *Pull.* 321, Lord *Alvanley* said, that "the court would not in their discretion amend any error in the proceedings against the bail, of which the bail are entitled to take advantage." So, *Stephenson* v. *Grant*, 2 *New Rep.* 103. In the case of *Perkins* v. *Pettit*, 2 *Bos.* & *Pull.* 275. the Court said there was nothing by which they could amend; and *Rooke* J. once expressed a doubt whether the Court had entirely concurred with Lord *Eldon*, when in that case he asserted, that the Court had a discretionary power to amend proceedings against the bail.

MANSFIELD C. J. In the case of *Stephenson* v. *Grant*, the Court thought the Plaintiff's conduct had been grossly wrong; but they said, that though bail were to a certain degree favoured, it was not to be understood that the Court would never permit an amendment in proceedings against bail. In the present case it would be very extraordinary if they would not permit an amendment, for it is to amend their own act. The argument against it supposes, that when the bail are taken, something passes concerning the debt and damages. But the entry in the filazer's book is merely this. "29th *May* 1807, *Paul* "*Calow* and *Edward Barker* were added as bail in this "cause, and justified in open court in 354*l*. each, and "were allowed." Afterwards, when proceedings are to be had against the bail, the officer from this memorandum makes out the recognizance in form. An application is now made to amend by adding that, which the bail have in truth undertaken to pay, that is, "the debt:" for these bail were at first taken in the same manner as all other bail; the mistake was afterwards committed in making

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making out the formal instrument, and it would be monstrous if this omission should render the acknowledgment of the bail a nullity.

HEATH J. One principal reason why the courts have been adverse to amend a *scire facias* against bail, is that the bail may have time to surrender their principal; for if they surrender him, the Plaintiff has satisfaction for his debt; but there is no ground in this case to believe that the bail would ever surrender their principal; because, if this mistake is fatal, the effect of it is, that although the bail should not surrender him, they would be liable only to a very trifling extent.

LAWRENCE J. In this case there certainly is enough to amend by, in the minutes of the officer. When bail are put in nothing is said either about debt or damages: the entry is, to pay the *condemnation money and costs*. The officer afterwards, upon reference to the writ, sees whether the action be debt or case, and draws up the recognizance accordingly. There are two things then, which are instructions for the officer, the writ and the minute, and it would be most monstrous if by this neglect of his the party should be deprived of his remedy.

CHAMBRE J. There are the same instructions from which the officer may supply the omission in this instance as he has to draw up the recognizance by in all other cases: the form of the verbal acknowledgment of the bail is in all cases the same, and the minute which is made of it in the filazer's book is sufficient authority for the amendment.

Rule absolute, the Defendant having liberty to plead *de novo*.

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May 20.

CHARLES and Another *v.* MARSDEN.

It is not of itself a defence to an action by the indorser of a bill of exchange, to plead that it was accepted for the accommodation of the drawer, without consideration, and was indorsed over after it became due.

Where a plea shall conclude to the country and where to the Court, *quære*.

Difficult questions are not to be pleaded as sham pleas.

THIS was an action brought by the Plaintiffs as indorsees of a bill of exchange drawn by *Atkinson*, against the acceptor. The Defendant pleaded that he had accepted the bill for the use and accommodation of *Atkinson*, and without any consideration whatsoever for the same, and that afterwards, and after the time when the bill became due and payable, *Atkinson* indorsed it to the Plaintiffs, they well knowing at the time of such indorsement, that it had been and was so accepted by the Defendant for the use and accommodation of *Atkinson*, and that the Defendant had not ever received any consideration whatsoever for the same. The Plaintiffs replied, (with a protestation of the insufficiency of the plea), that *Atkinson* indorsed the bill to them before the time when it became due, and not after, as the Defendant had alleged; and that, they prayed, might be inquired of by the country. The Defendant demurred; and assigned for cause that the replication concluded to the country, whereas, inasmuch as the Plaintiffs had offered an issue only on one of the facts set forth in the plea, and not on all, they ought to have concluded their replication to the Court with a verification.

Best Serjt. in support of the demurrer, and *Shepherd* Serjt. *contrà*, largely investigated the doctrine upon this question, as it is to be collected from the several cases of *Hedges* v *Sandon*, 2 *T. R.* 439. *Baynham* v. *Matthews*, 2 *Str.* 871. *Clarke v. Glass*, 1 *Williams's Saund.* 103. *b. n.* *Stanford* v. *Rogers*, 2 *Wils.* 113.; better reported by *Buller*, J. 2 *T. R.* 443. *Smith* v. *Dovers*. *Dougl.* 427. (which, *per Lawrence* J., has been overruled,)

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ruled,) *Hayman* v. *Gerrard*, 1 *Williams's Saund.* 102a., the cases collected in the note there, and the rule proposed by the learned editor. But the Court suggested a doubt whether the plea could be supported, and desired them to turn their attention to that question. *Best* contended on the authorities of *Brown* v. *Davis*, 3 *T. R.* 80. *Boehm* v. *Stirling*, 7 *T. R.* 423. and *Taylor* v. *Mather*, 3 *T. R.* 83. *n.* that the plea stated a sufficient defence to the action.

MANSFIELD C. J. There is no allegation of fraud in this plea, nor any averment that the Plaintiff did not give a valuable and full consideration for this bill: it must therefore be presumed that he did, and that there is no fraud in the transaction: he receives the bill from the proper hand which was entitled to have the possession of it, the person to whom it was payable. It is not necessarily to be inferred, because it was an accommodation bill, that there was an agreement not to negotiate it after it became due; but if there was such an agreement, it was the Defendant's own fault that the bill was outstanding; for even supposing that the drawer had undertaken to provide for the payment, when the bill became due, the acceptor had a right to require that it should be given up. It happened through his permission therefore, if the bill gave the drawer any power to delude the indorsee. None of the cases cited go so far as to support this plea.

HEATH J. In this case there was no inconvenience or mischief to the party.

LAWRENCE J. I remember a former case of a sham plea, where the pleader had raised a question of great difficulty, and it being suggested that it was a sham plea, the Court required an affidavit of the truth of the facts pleaded, considering it a most gross contempt to

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put questions of difficulty in the shape of a sham plea. Upon this intimation of the feeling of the Court, the plea was afterwards abandoned, and the debt was paid. Not indeed that there is any difficulty in this question; for none of the cases cited go the length contended for. Where a party has obtained the bill by fraud, or where there is any perjudice to the drawer, those cases apply; but unless in instances of this kind, the acceptor is not relieved. This case may fall within some general expressions which have been used by the Court in giving Judgment, but those expressions are always to be taken with reference to the cases to which they were applied. One was a cases of clear fraud: another was a smuggling transaction. In the present case, it is to be supposed that the party persuades a friend to accept a bill for him, because he cannot lend him money. Would there be any objection, if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it, before it was due? Then what is the objection to his furnishing the money on it after it is due? for there is no reason why a bill may not be negotiated after it is due, unless there was an agreement for the purpose of restraining it. But if there had been such an agreement, it should have been stated in the plea, and it might then have been a defence: but that is not so here. This bill then must be presumed to be given in order that the party may raise money on it in the ordinary way. I see nothing in the transaction prejudicial to the acceptor; and the plea is bad in substance.

CHAMBRE J. This plea is bad in substance. It was never meant that the Defendant should have any consideration for the bill. If he had lent money, it would have been without consideration: but he could not perhaps lend money; he therfore lent a bill. He is not hurt,

hurt, if he cannot be called upon before the time when the bill is due. There is no fraud or collusion: the indorser receives this, as he would receive any other bill. I cannot see any reason why, because there was no consideration, the bill should therefore not be negotiable. The other question would require much examination, and would render it necessary to go through the cases, some of which appear to clash, and it might be difficult to reconcile them, but it is unnecessary to give any opinion upon that point.

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Judgment for the Plaintiff.

TOULMIN *v.* ANDERSON.

May 21.

It does not necessarily increase the risk on a policy, to convey prisoners of war in the vessel insured.

All trading within the limits of the *South Sea* Company's charter is illegal, unless it is licensed by them.

The st. 47 *G.* 3. *sess.* 1. *c.* 28. legalizes, from *Sept.* 17, 1806, the trading to any places which then were, or should thereafter be, under the dominion of His Majesty. *Buenos Ayres* was taken by his majesty's troops in the preceding year, and retaken on 12th *August* 1806. Held that an adventure to *Buenos Ayres*, commencing in the first week of *September* 1806, was illegal, and the policy on it void.

Whether *European* goods may be transported from colony to colony within stat. 15 *Car.* 2. *c.* 7. *s.* 6., *quære.*

A loss by barratry is well alleged, though the proof is, that it happened by the act of an enemy and by barratry jointly.

THIS was an action upon a policy of insurance, effected on the ship *Adiona* and her cargo at and from the *Cape of Good Hope* to *Buenos Ayres*. Upon the trial of this cause at the Sittings after *Michaelmas* term last, before *Chambre* J. and a special jury, in was proved that *Hopley* had put goods, consisting chiefly of *British* manufactures, on board the ship, at the *Cape*, during the first week in *September* 1806. On the 10th of the same month he directed the Plaintiffs to effect the insurance. Three *Spanish* naval officers, then resident at the *Cape* as prisoners of war on their parol, obtained from Sir *David Baird*, who exercised the chief command there, a permission or order, that they might pass over to *South*

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America in this vessel: but they were informed by him, that they were still to consider themselves as prisoners of war, and were enjoined upon their arrival to appear before General *Beresford*, who then had a command in *South America*, in order that they might be exchanged by him for *English* prisoners. But it did not appear that this circumstance was communicated to the captain of the ship. They were accordingly received on board, where they had their passage gratuitously. They we not searched, nor subjected to any restraint during their voyage. The vessel sailed, and had nearly arrived at the *English* bank of the river *late*, when the *Spaniards*, being armed with dirks which they had concealed, together with four *English* mariners, overpowered the master and the rest of the crew, ran the ship aground, and escaped. The vessel, with a part of the goods, was afterwards burnt, to prevent capture. The declaration alleged, that certain of the mariners barratrously took the ship from the master, and ran her aground, and deserted her, and that the master burnt the ship with the cargo, to prevent her falling into the hands of the enemy. The Defendant's subscription to the policy was admitted. The order of council of the 17th of *September* 1806, purporting to legalize the trade to *Buenos Ayres*, was produced in evidence. No licence for this adventure had been obtained from the *South-Sea* Company.

Best Serjt., for the Defendant, made the following amongst other objections to the right of the Plaintiff to recover. First, that the owner, by taking the *Spaniards* on board, had materially increased the risk of the adventure, without the consent of the underwriters. 2dly, That the ship was not lost merely by the barratry of the crew, as alleged in the declaration, but principally, or at least in part, by the hostile act of the *Spanish* prisoners. 3dly, That this adventure was illegal, as being an infringement

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fringement of the rights secured to the *South-Sea* Company by the stat. 9 *Ann.* c. 21., and that this objection was not done away by the stat. 47 *Geo.* 3. *sess.* 1. c. 23. for two reasons. 1st, Because that statute purports to legalize the traffic therein mentioned, only from the 17th of *September* 1806, whereas these goods were laden on board in the first week of that month, and the policy attached from the 10th of the same month; and 2dly, because *Buenos Ayres* having been retaken by the enemy on the 12th of *August* in the same year, was not at the time of passing that act, a place belonging to, or in the possession, or under the dominion or protection of his majesty." 4thly, That supposing *Buenos Ayres* was to be considered as a *British* colony, this adventure was rendered illegal by the stat. 15 *Car.* 2. c. 7. *ss.* 6 & 8. which prohibits goods, the produce of *Europe*, from being imported into any colony from any other country, except immediately from *Great Britain*. *Chambre* J. was of opinion, that the taking the prisoners on board did not necessarily vary the risk, but left it to the consideration of the jury, whether the circumstance had increased the hazard in this instance; he also thought that it was immaterial whether the *Spaniards* or the *English* mutineers first suggested the act of piracy; if the mariners in fact did mutiny, it was barratry. The jury found a verdict for the Plaintiff.

Best Serjt. in the last term had obtained a rule *nisi* to set aside the verdict, and enter a nonsuit, upon the several objections above stated.

Shepherd, *Lens*, and *Vaughan* Serjts. on a former day in this term shewed cause, and *Best* and *Onslow* Serjts. were heard in support of the rule: as the principal arguments which they used are referred to in the judgment, they are here omitted.

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After time taken to consider,

MANSFIELD Ch. J. now delivered the opinion of the Court.

This case arose upon a contract of insurance. The policy was upon a voyage from the *Cape of Good Hope* to *Buenos Ayres*. The declaration alleges that a loss has been occasioned by the barratry of the mariners. The loss being clearly proved to have happened, and all the evidence having been produced which is necessary to entitle the Plaintiff to recover, and the jury being of opinion upon the facts that he ought to recover, several objections have been made for the purpose of setting aside their verdict, and entering a nonsuit. First, much stress has been laid on the taking on board of three *Spanish* prisoners of war, who were on their parol, and who, as it appears, were taken on board by the permission of the governor then residing at the *Cape*, and for the purpose of being delivered up to the *English* commander in chief in *South America*, in order to be exchanged for *English* prisoners. The foundation of this objection is, that the taking these three prisoners on board altered the risk of the underwriters, and consequently put an end to the contract of insurance; but as to this, we have no medium through which we can form a judgment of what might be expected, or what was likely to be the consequence. In many cases the taking three such persons on board might be of great use. It is much the practice for vessels to approach an enemy's coast with a prisoner or two on board, under a pretended flag of truce. It was suspected that these prisoners were the authors of the mutiny, but it was not proved. As it is not shewn that the giving a passage to these persons must necessarily increase the risk, we can form no judgment on this head; the question was properly left to the jury, and they thought that the risk was not thereby increased; the objection

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jection therefore can have no weight here: It was also objected, that the voyage was illegal on two several grounds: the first is, that the sending the goods insured from the *Cape* to *Buenos Ayres*, is contrary to the general laws for the protection of *English* navigation, which prohibit the sending out any *European* goods to the Plantations except in *British* ships. The words of the statute 15 *Car.* 2. *c.* 7. *s.* 6. are very general, that "no commo-" dity of the growth production or manufacture of *Eu-" rope* shall be imported into any land, island, &c. to his " majesty belonging, or which shall hereafter belong " unto, or be in the possession of, his majesty, in *Asia*, " *Africa*, or *America*, (*Tangier* only excepted,) but what " shall be *bonâ fide* and without fraud laden and shipped " in *England*, *Wales*, or the town of *Berwick-upon-" Tweed*, and in *English*-built shipping, and which shall " be carried directly thence to the said lands, *&c.* and " from no other places, or place whatsoever." These words extend the prohibition not only to the plantations then belonging to his majesty, but to all which should thereafter belong to the crown of *England*. It has been contended by the Plaintiff, that these goods might be legally exported from *Great Britain* to *Buenos Ayres*, although they should go by the way of the *Cape*, and touch there; and that this being so, it would make no distinction whether they were landed at the *Cape*, and kept there for a time, or whether they were immediately carried on to the place of their ultimate destination; that the policy of the act would in either case be substantially satisfied, by making *Great Britain* the general depôt and port of delivery of all goods going out to the colonies. But it would be difficult for the Plaintiff to get rid of this objection; for although upon inquiry it has not been discovered that any sentence of condemnation has been pronounced in the admiralty court, or court of appeal, on the ground that a ship has carried *European* produce

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produce from one colony to another; and though there is reason to believe that it has been generally understood in the mercantile world, that goods landed on one *West-India* island may be removed to another, still there has been no legal decision upon the subject; and considering the words of this statute, there might be much room to hesitate, before the Court could declare that such a practice is allowable. But we are not called upon to decide this point now; for an objection is raised, that by the almost forgotten charter of the *South-Sea* Company this voyage is rendered illegal; and it is impossible for us to get over this objection. The statute 9 *Ann. c.* 21. *s.* 47. gives to the *South-Sea* Company in the strongest terms possible an exclusive right to trade in the *South-Seas*. The 49th section, "to the end the said *South-Seas*, or "the kingdoms, &c. and places within the limits "therein mentioned shall not be visited, frequented, or "haunted, by any others, enacts under severe penalties "that none of the subjects of her majesty, of what de-"gree or quality soever they be, other than the said "Company, or their factors, agents, or servants, or "other persons by them licensed thereunto, shall di-"rectly or indirectly trade, traffick, or adventure, into, "unto, or from, the said *South-Seas*, or other the parts "within the limits aforesaid, or shall *hire, freight, or fit* "*out*, any ship or ships, or lade, or *put on board* any ship "or ships, any goods or merchandizes whatsoever, with "*intent to haunt*, traffick, trade, or adventure into, un-"to, or from, the said *South-Seas*, or other parts within "the limits aforesaid." Nothing can be a stronger prohibition of even fitting out a ship for the purpose, than this is; and consequently the trading of this ship, being carried on without a licence obtained from the *South-Sea* Company, is as directly in contravention of this clause as possible, unless it be legalized by one of the two recent acts of parliament on which the argument of

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the Plaintiff's counsel relied; for as to the orders of council, they are of no avail, if not aided by these acts. The first of them, namely, the stat 46 *Geo.* 3. *c.* 11. gives power to the crown to make orders for regulating the trade to and from the *Cape of Good Hope*, that is, to direct what goods shall be exported, in what ships, and subject to what duties; but it does not in the least degree relate to the trade from thence to the *South-Seas*, and we may therefore lay it wholly out of the question. The other statute is that of 47 *Geo.* 3. *sess.* 1. *c.* 23. When the argument upon this act was first used, considering what was the intention of the legislature at the time of passing this statute, it appeared a monstrous thing that persons standing in the situation of these Defendants, and having known the objection to exist at the time when they made the contract, should avail themselves of it, but they certainly are legally entitled so to do if they think fit. Since then *Buenos Ayres* was not, when this act passed, in the possession or under the protection, of his majesty, it does not seem possible that it should legalize the trade in question. The statute has the words, "which now "are, or shall hereafter be, belonging to, or in the pos-"session, or under the dominion or protection of his "majesty." The way to put this in the clearest light, is to suppose that an action were brought by a common informer for the penalty of double the value of the goods, given by the stat. 9 *Ann.* *c.* 21.; and that instead of pleading the general issue, which is the mode of pleading now used in these cases, it were necessary, as it formerly would have been, specially to plead this statute of 47 *Geo.* 3. Is it not perfectly clear, that the plea must aver, that at the time of the traffic *Buenos Ayres* was under the dominion of his majesty? And is it not equally clear that if issue were taken upon that plea, the verdict must pass for the Plaintiff? And although pleading specially upon penal statutes has long been disused, yet the

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the evidence of the Defendant's innocence must be the same upon the general issue, as it must have been upon the special plea. It is impossible then for this statute to make good the want of a licence; and whatever may be the hardship of the case, the trading and the voyage are illegal, they are an infringement of the charter, and the Defendant is entitled to insist on a nonsuit.

Rule absolute.

May 21.

DOE, on the Demise of GORGES, and Others v. WEBB.

Wherever it appears to be the intention of a testator that the whole of his estate shall go over together, upon the failure of issue of more than two tenants in common, cross remainders shall be implied between them in the mean time, in order to effectuate that intent.

IN this ejectment, which was tried at the *Monmouth* spring assizes 1808 before *Graham* B., a verdict was found for the Plaintiff, subject to the opinion of the Court, upon a case, which stated, that *Frances*, the wife of *Thomas Fettiplace*, being seised in fee of the moiety of certain manors and estates in the county of *Monmouth*, and no others, and having power to dispose of them by writing in nature of a will, in the due execution of such power devised the same by the descriptions of all that her moiety of the several manors therein named, and her moiety of all manner of tithes of grain in certain parishes enumerated, and all other her manors, messuages, lands, tenements, and hereditaments whatsoever, situate in the county of *Monmouth*, or elsewhere in *Great Britain*, to her husband for his natural life, and after his decease she devised all her said moiety of the manors, messuages, lands, tenements, hereditaments, and other the premises unto her youngest son *Charles Fettiplace* for his natural life; and after the determination of that estate, to the use and behoof of *John* Lord *Chedworth* and his heirs for the natural life of the said *Charles Fettiplace*, upon trust for preserving the contingent remainders; and after the decease of the said *Charles Fettiplace*, she gave the same moiety

moiety of the said manors, messuages, lands, tenements, and hereditaments, and other the premises to his first and other sons, and to the heirs male of their bodies, severally, successively, and in remainder; and in default of such issue she gave the same moiety to his daughter and daughters as tenants in common, and to the heirs of their bodies; and in default of such issue she gave the same moiety to her eldest son *Robert Fettiplace* for his natural life, with remainder to the same trustee to preserve the contingent remainders; and after the decease of the said *Robert Fettiplace* she gave the same moiety to his first and other sons, and to the heirs male of their bodies successively; and in default of such issue she gave the said moiety of the same manors and premises to his daughter and daughters as tenants in common, and to the heirs of their bodies; and in default of such issue she gave the said moiety of the same manors and premises to her three daughters *Frances Fettiplace*, *Mary Fettiplace*, and *Arabella*, and to the heirs of their bodies respectively, as tenants in common; and in default of such issue, she gave the same to her own right heirs for ever. The case then stated the death of the testatrix and of several of the devisees and those claiming under them, and stated the result to be, that unless cross remainders were created or implied by the devise in the will of Mrs *Fettiplace* to her daughters and to the heirs of their bodies, the lessors of the Plaintiff were entitled to 25 undivided three hundred and sixtieth parts of the premises. If cross remainders were created by that devise, the lessors of the Plaintiff were not entitled; and in that case a nonsuit was to be entered.

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Williams Serjt. in support of the verdict. The doctrine of cross remainders has of late years undergone considerable changes. Mr. *Conyers*, who argued the case of *Cook* v. *Gerrard*, 1 *Saund*. 185. contended, that in the case of *Gilbert* v. *Witty*, *Cro. Jac*. 655. the Court was com-

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compelled by necessity to construe that the wife should immediately after the death of the two sons take the messuages devised to them, because the Judges *could not* make cross remainders among three; and that for that reason alone they had determined that the wife should take immediately after the death of the sons, because there was no other to take. *Lea* C. J. thought otherwise, because the question arose on a will, and it was not the testator's intent to prefer the *feme* as long as he had issue of his body. This intent appeared by the word *all*: the words of the devise being these: that if all his said children should depart this life without issue, then his messuages should remain and be to *Margery* his wife and her heirs. But the Court, notwithstanding, resolved upon consideration, that it could not be a cross remainder. And the law was the same in Lord *Hale's* time, who says, in 1 *Vent.* 224. *Cole* v. *Livingstone*, that the law will not presume cross remainders even between two, in the case of a deed, nor even in a will, unless the limitation over be, if they die without issue of their bodies, *vel alterius eorum*. The case of *Comber* v. *Hill*, 2 *Str.* 969. S. C. *Cas. temp. Hardwick*, 22. is not, in its circumstances, distinguishable from this. Lord *Hardwicke* there thought, that where remainders were to two, and the heirs of their *respective* bodies, cross remainders were not to be implied. He was of opinion, that in the devise over in default of *such* issue, the word *such* might very well refer to the word *respective*. And the same doctrine was afterwards implicitly adopted in 2 *Str.* 996. *Williams* v. *Brown*. What was said in the last-mentioned case by Lord *Hardwicke*, seems to be questioned by the Court of King's Bench in the subsequent case of *Wright* v. *Holford*, *Cowp.* 31.; but there the word *respective* was not used: the devise was to the use of all and every the daughter and daughters, and to the heirs of their body and bodies, and in default of such issue, then over. Here the

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the devise is to all the daughters, by name, and to the heirs of their bodies *respectively*. It would be vain to criticise the doctrine supposed to have been settled by the cases of *Atherton* v. *Pye*, 4 *T. R.* 710. *Phipard* v. *Mansfield*, *Cowp.* 797. and *Pery* v. *White*, *Cowp.* 777. But the courts seem since to have thought that they had gone rather too far: for in the case of *Doe on the Demise of Cock* v. *Cowper*, 1 *East*, 229. the Court of King's Bench very properly adjudged that there no cross remainders were to be implied: and it might be thought that the antient rule of law had been restored, were it not for the subsequent case of *Watson* v. *Foxon*, 2 *East*, 36. which must be admitted to be fully as strong as the present case. In the case of *Doe* v. *Cowper* Lord *Kenyon* C. J. recognized the authority of *Comber* v. *Hill*, and *Lawrence* J. said, "it is a settled rule that cross remainders "shall not be implied between more than two, unless "such appears upon the face of the will to have been "the intention of the testator." [*Lawrence* J. Is that any thing more than a declaration that the Court must try to find out what the testator meant ?] In the case of *Watson* v. *Foxon* cross remainders were implied, not withstanding the word *respective* was used; and *Lawrence* J. cited the case of *Doe* v. *Burville*, 2 *East*, 47. *n*. The present case, it must be admitted, is not distinguishable from that of *Watson* v. *Foxon*. If the word *respective*, on which Lord *Hardwick* so much relied, is of no weight, the point cannot be argued; and if the modern cases are to be supported, the verdict cannot stand.

Lens Serjt. *contra* was stopped by the Court.

MANSFIELD Ch. J. It has been truly said, that the antient doctrine on this subject has been broken in upon; but it is wonderful how it ever became established. The method to bring the estate all together, is to

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imply cross remainders. Here the testatrix devises her moiety of her several manors and lands, and all her moiety of her tithes, &c., treating it as one entire subject of devise, to her husband in the first place. She then adds several devises over, and in each of them she studiously describes her estate by the most collective and comprehensive terms, and devises all that she had before devised, to her sons, and their sons, and their daughters, in succession. Afterwards, in default of such issue, she gives the same moiety to her three daughters, and the heirs of their bodies, as tenants in common, and not as joint tenants; and in default of such issue, (not thereby meaning her daughters, for to them she gave estates respectively, but the heirs of their bodies) she gives the *same* to her own right heirs. What was the same? It is evident from every preceding devise, that the same was the whole. She had in no part of her will disposed of less than the whole. It is plain then that it was not her intention that a part should go to her heir at law, but the whole: she has given him nothing, unless the issue all her daughters should fail, when the heir at law was to take any thing, he was to take the whole estate. Much stress has been laid on the word *respectively* by Judges of great name. How the use of that word could make any difference in construing the meaning of the testator, it is difficult to discover; for if the word is omitted, the sense continues the same: a devise to two as tenants in common, and to the heirs of their bodies, must necessarily mean, to the heirs of their respective bodies. And yet the case of *Phiphard* v. *Mansfield*, at the time when it was adjudged, was considered by many lawyers as a very strong determination.

Heath J. I am for adhering to the modern decisions, as being most agreeable to reason and good sense. Great uncertainty would be introduced by overturning them;

them; and it is of the utmost importance that the rules of law affecting the disposition of real property should be known and certain.

LAWRENCE J. Lord *Kenyon* in the case of *Watson* v. *Foxon*, and Lord *Mansfield* in that of *Wright* v. *Holford*, declared that they could not understand what Lord *Hardwicke* meant by relying on the word respective. In the case of *Roe* v. *Clayton*, 6 *East*, 628. which has not been cited, the word respective was not introduced into the devise, but the Court determined that cross remainders were created, principally on account of this circumstance, that it was a devise of *all* the testator's estate. They collected from this, that it was the testator's design that it should all go over together. In the present case the testatrix, by referring so frequently to the *same moiety*, and using that phrase throughout the will, shews that she meant nothing to go over, unless all went. The whole was to pass to her heirs together. It therefore must have been the intention of the testatrix, to create cross remainders, for she could not otherwise effectuate her object. As to the word *respectively*, the cases which have founded themselves on the distinction of that expression must now be considered as having been overruled. What Lord *Kenyon* said in the case of *Watson* v. *Foxon*, merely amounted to this, that the only thing necessary in order to imply cross remainders was to ascertain the intention of the testator: no technical words are required.

CHAMBRE J. I am of the same opinion. I wonder, as my Lord does, how the old doctrine ever became established. The oldest case is that in *Dyer*, 303. *b*., and there, no difficulty was found in giving cross remainders by implication among five; that was not a stronger case than this. It was necessary there, in order

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to effectuate the testator's apparent intent, that all the tenants in tail should take by cross remainders. So here, the testatrix devises over the remainder of *all her moieties* to her daughters as tenants in common, and the heirs of their bodies: she then gives the *same* to her right heirs; but it is impossible that the whole should at once go over to her heir, without either devesting estates which are *in esse*, or supposing, what is almost impossible, that all the tenants in tail should die at one moment. Therefore cross remainders must be implied here.

Let the *postea* be delivered to the Defendant.

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May 24.

TROVER for a whale, the half of a whale and certain quantities of whale flesh blubber, oil, spermaceti, and whale bone. Upon the trial of this cause at *Guildhall*, before *Mansfield* C. J., at the Sittings after last *Michaelmas* term, it appeared that the Plaintiffs were the owners of the *William Fenning*, and the Defendants owners of the *Caerwent*; both being ships employed in the summer of the year 1805, in the *Southern* whale fishery, among the *Gallipagos* islands. While *Luce*, the captain of the Plaintiff's ship, was engaged in killing a whale, he struck another, one of a shoal, with a harpoon made fast by a short line or warp to a small buoy called a droug. The wound produced the usual effect of this weapon, it retarded the progress of the fish by causing it to struggle with the harpoon for a considerable time, while its companions escaped into the offing; and the droug floating on the water marked its course, so that it was with the more certainty

One tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it, as to render it impossible that the Plaintiff should ever take and use it.

The conversion of a chattel by a tenant in common to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject matter, as to prevent the Plaintiff from taking and using it in its altered state; therefore it creates no right of action.

Where the general consent of the persons engaged in a trade, has established certain rules for the conduct of that trade, it is not competent for any number of individuals to promulgate a contrary regulation.

And though they may agree amongst themselves to adopt new rules, they cannot thereby deprive one who has not assented to their compact, of the benefit of the old rules, as against themselves.

Though i[illegible]e a trade recently established.

More especially if the trade, and the custom, be of such a nature, that the subjects of several nations partake in the trade, and are governed by the custom.

By the custom of the whale fishery among the *Gallipagos* islands, he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it.

By the custom of the *Greenland* whale fishery, unless he who first strikes a fish continues his dominion until he has reduced it into possession, any other person who kills it acquires the entire property.

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pursued by *Anthony*, the master of the *Caerwent*, who, in consequence of a singal made to him by *Luce*, followed the fish, and killed it. He extracted from it the oil and other valuable matter, but rendered no part of it to the Plaintiffs. Numerous witnesses deposed, that a custom had universally prevailed in these seas, from the origin of the fishery, until within a few years past, that the party who first struck the fish with the droug should receive one half of it from the party who killed it. But it appeared by the testimony of the Defendant's witnesses, that for a few years past, since 1792, many captains of the ships employed among the *Galipagos* islands, among others, one *American*, had usually agreed that the striking a fish with a droug should not entitle the striker to a share. In the year 1805, *Anthony*, with five or six *English* captains, of whom *Luce* was not one, had, upon their arrival at the fishing station, acceded to these terms. The Defendant's counsel contended that the Plaintiff must be nonsuited, because, according to his own claim, he was tenant in common with the Defendant: but on account of the testimony of one witness, who stated that the person who first struck the fish was entitled to the whole, rendering half to the party who killed it, the Chief Justice left the case to the jury, who found that by the custom the Plaintiff was entitled to half the fish and gave him in damages the value of a moiety.

Shepherd Serjt, had in a former term obtained a rule *nisi* for a new trial, upon the ground that either this was not such a custom of a particular trade as to be binding in law, or, if there had ever been such a custom, the verdict was contrary to the evidence of the present practice of the fishery; and the dissent of the captains now frequenting those seas remitted all the parties to their common law right; which was, that possession alone confers property in animals *feræ naturæ*, and that the

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striking with a missile weapon gives no property in them; it was also within the scope of his rule to set aside the verdict, and to enter a nonsuit, upon the ground that the parties being tenants in common the action could not be maintained.

Best and *Williams* Serjts. in shewing cause against the new trial, contended, that there was evidence of a general custom established in this trade, sufficient to make it obligatory upon all who frequented that fishery. In the *Greenland* trade the custom indeed is the reverse. There the question is, whether the whale is a fast fish or a loose fish; unless the harpoon is in the whale, the whale fast to the towing line, and the towing line attached to the boat, the first harpooner has no right; the taker always has the whale. (*a*) But although that practice differs from the law established in these islands, the numerous cases which have been decided on the custom of the *Greenland* fishery sufficiently shew that the local rule is binding within its own limits. Although this custom is

(*a*) *York* Lent Assizes, 1788. *Thursday, March* 13.

LITTLEDALE and Others *v.* SCAITH and Others.

In an action of trover for a whale, which had been struck first by an harpooner of the Plaintiff's ship, and afterwards by an harpooner of the Defendant's, the counsel on both sides, and all the parties concerned, agreed the law to be, both by the custom of *Greenland*, and as settled by former determinations at *Guildhall, London*, as follows.

While the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a fast fish: and though during that time struck by a harpooner of another ship, and though she afterwards breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it.

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not so old as the common law, yet it is as old as the trade itself, and it is equally binding with the comparatively modern custom of merchants, which postpones the payment of a bill of exchange during the three days of grace. This fishery is not confined to the *English*; the *French*, *Americans*, and many other nations partake in it. As the law which regulates it, affects the subjects of so many different nations, it may become a matter of treaty, or a cause of warfare, between their respective governments; and though, like many other customs of trade, it had its commencement in the practice of a few, it is not now to be altered by any other than the supreme authority. It is not, therefore, competent for five or six *Englishmen* to legislate for all their fellow subjects, and even for all the world. Even if it had happened that those persons and the Plaintiff were all who fished there in that season, what case is there except that of a corporation, so constituted by law, where the act of a majority can bind the minority? But, further, the very evidence of an agreement to supersede the custom, proves the continuance of it; and the utmost that the Defendant can urge, is, that there was conflicting testimony as to any conventional alteration of the law, upon which the jury, whose proper province it is, have expressly decided; that the old custom of the trade still continues. It is immaterial whether this be called an universal agreement in the trade, or an usage, or a custom. In a recent case, *Anscomb* v. *Shore*, *post*. 261. *Heath* J. said, "It is not because a witness calls a thing a right or a custom, that a party is therefore to be deprived of the benefit of his testimony: the question is, What, in substance, does he prove?" If it be necessary to consider this practice as in the nature of a law, it possesses the quality so essential to that character, of being highly reasonable; for all the witnesses agreed, that he who strikes a whale with a droug most materially contributes

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tributes to the taking it. But it is not necessary to shew this; for if it be considered as an agreement, there is clear evidence that it has been universally adopted in the trade: it must therefore remain in force, unless it is proved that a subsequent agreement, superseding it, has been adopted by the Plaintiff: but as he was not a party to the agreement of the few other adventurers, his rights cannot be affected by it. As to the second point, they contended, that the cutting up the whale and expressing the oil was such a destruction of the subject-matter of the tenancy in common, as would enable one tenant to maintain trover against his companion; and in support of this proposition, they cited *Barnardistone* v. *Chapman*, *Bull. N. P.* 34., where a ship was sent to the *West Indies*, and lost in a storm, and the question whether this were not a destruction by the Defendant, was left by Lord *King* C. J. to the jury, who found that it was. But the destruction of the subject-matter is only by way of example: the principle upon which it is held that one tenant in common cannot sue his co-tenant, is, that he has another remedy, namely, his right to take and use the chattel at all times when not actually occupied by the other; but this right ceases, and he can no longer take it, and consequently his right of action commences if the subject-matter be either destroyed or changed. Though one tenant in common may take the olives, wheat, or grapes, which are in common, he cannot take the oil, flour, or wine, which his companion has expressed from them, for their nature is altered. So if grain is taken and made into malt, money into a cup, or a cup into money, they cannot be re-taken. *Bro. Ab.* 161. *b. Property*, 23. If two tenants in common be of a dove-house, and one destroy the old doves, by which the flight is wholly lost, the other shall have trespass. And so of a park, if he destroy all the deer, 1 *Co. Litt.* 200. *a.* In 8 *T. R.* 145. *Martin* v. *Knowllys*, where a tenant

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tenant in common brought case in the nature of waste against his companion for cutting down trees, Lord *Kenyon* C. J. laid it down as law, that if one tenant in common misuse that which he has in common with another, he is answerable to the other in an action, as for a misfeasance. The Plaintiff in this case is entitled to the possession of the whale in *specie*, either to the whole, or part; if to the whole, the Defendant was guilty of a tortious conversion in cutting it up and using it as his own; if to a part only, the Defendant having put it out of the Plaintiff's power to take possession of it in its original state, the right of action accrues.

Shepherd, contra, was stopped by the Court.

MANSFIELD Ch. J. There is no pretence to say that the custom proved was such that the owner of the droug should have the whole whale subject to the claim of the taker for a moiety of the proceeds; and it would be very inconvenient if it were so; for the fish might often be killed at a great distance from the vessel of the former. This is an action of trover, founded on the Defendant's taking the Plaintiff's property, and converting it to his own use. According to the custom proved for the Plaintiff, the fish belongs to the two parties, and they are tenants in common of the whale. It is admitted that the taking by the Defendant, and his refusal to deliver, is no misfeasance in a tenant in common, and does not give a right of action: can it then be contended, that although he has a right to keep the whale, he has not a right to apply it to the only purpose which can make it profitable to the owners? He must of necessity have a right to do that which is requisite for the preservation of the chattel; otherwise it becomes good for nothing. I can understand why his destroying that which belongs to his companion should give a right of action,

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but I cannot see why his preserving it should have the same effect. If the authorities cited from *Brook* were applicable here, (which they are not, as he is speaking only of sole property,) it would follow, that if two millers are partners, as soon as one of them grinds wheat, he makes it his sole property. But the tenants in common of the wheat must be tenants in common of the flour. And so the tenants in common in this whale, must be tenants in common in the produce, after it is converted into oil. The case decided by Lord *King* proceeded upon the principle that there was a destruction of the subject matter; and upon that ground it was held that the action might be maintained. It would be difficult for the Defendant to get rid of the merits of the Plaintiff's case, though a considerable degree of doubt might be created by the change of practice in the trade; but it is unnecessary to decide that question.

HEATH J. I am of the same opinion. It is admitted that the refusal to deliver, is in this case no evidence of a tortious conversion. Is there then any subsequent tortious conversion? The law is well laid down in *Martin* v. *Knowllys*, that a tenant in common may make any fair profit of the chattel, but if he makes an improper use of the property, it is actionable. In this case there is another remedy; and the Plaintiff may pursue it.

LAWRENCE J. I am of the same opinion. I collect from his Lordship's notes, that he who struck with the droug is entitled to half; as some witnesses say, to half the oil; as others, to half the blubber; and since there is a tenancy in commom, one tenant cannot sue the other. But it is said, if the one party is entitled at the time the whale is killed, the other cannot change the form of the property, though it tends to preserve the thing itself; and that the changing it is a tortious conversion:

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version: but no case has been cited which warrants this position. The only case of trover brought by a tenant in common, is that which was tried before Lord *King*, where the jury found that the Defendant had destroyed the property. But that is not the case here. The whale is killed at sea; and the only thing to be done with it, is, to convert it into oil. The Defendant has done that which is for the benefit of all parties. They are tenants in common of the produce, just as they were of the whale; and consequently the action is not maintainable.

CHAMBRE J. I should have been very unwilling to grant a new trial, if the only question had been on the custom. There must of necessity be a custom in these things to govern the subjects of *England* as well amongst themselves, as in their intercourse with the subjects of other countries. The usage of *Greenland* is held to be obligatory not only as between *British* subjects, but as between them an all other nations. I remember the first case upon that usage, which was tried before Lord *Mansfield*, who was clear, that every person was bound by it, and said, that were it not for such a custom, there must be a sort of warfare perpetually subsisting between the adventurers; and he held it strongly binding, from the circumstance of its extending to different nations. The same necessity must prevail in the *South Seas*, although the fishery has not been so long in use, in order to regulate our intercourse with the *French*, *Americans*, and others who resort thither. A few persons may by compact among themselves for a particular season, renounce any advantages, and subject themselves to any disadvantages that they please; and this would bind all those who assented to it: but *Luce* was no party to this compact. Upon the second point I entertain no doubt. The demand which is supposed to have been made by the

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the Plaintiff, for an actual division, was not proved; and if such a demand had been made, an instantaneous division was impracticable, on account of the bulk of the animal. The practice in the fishery is to preserve that which is valuable, and throw away that which is unless: for which purpose it is necessary first to cut up the fish. There are cases which establish the principle that one tenant in common cannot recover for a chattel in trover against his companion, without first proving a destruction of the chattel, or something that is equivalent to it. There must be that which amounts, as it were, to an ouster, so that a tenant in common who commits it, cannot account. Nothing of that sort subsists here. There are many older cases than those which have been cited, but there is none in which an action has been maintained without proof of a destruction.

Rule absolute to enter a nonsuit.

COHEN v. HINCKLEY.

May 25.

The sailing with convoy required by the stat. 43 *Geo.* 3. *c.* 57. is a sailing with convoy for the voyage.
It is not sufficient to sail with a convoy appointed for another voyage, though it may be bound upon the same course for great part of the way.
A ship cannot legally sail from port to port without convoy, unless she is bound from port to port.
If a convoy has sailed, a ship cannot legally endeavour to overtake it.
The stat. 43 *Geo.* 3. *c.* 57. does not avoid policies on ships sailing without convoy, unless the party interested in the insurance was privy to or instrumental in the sailing without convoy.

THIS action was brought upon a policy of insurance, effected on the ship *Union*, from *London* to *Quebec*, with liberty to seek, join, and exchange convoy, and under a stipulation to return five pounds *per cent.* if she should sail with convoy bound to *Quebec*, *Halifax*, or *Newfoundland*, and arrive. Upon the trial at *Guildhall*, before *Mansfield* C. J. at the Sittings after *Michaelmas* term last, it was proved, that the ship having arrived at

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Portsmouth on the 24th of *April*, about ten hours after a *Quebec* convoy had sailed for *Falmouth*, under orders to lie too, and call for ships off that port, the captain wrote to the Plaintiff, who was the owner, to come to *Portsmouth*. He also expressed his opinion that he might possibly be able to overtake the convoy, at *Falmouth*. The Plaintiff was soon after seen at *Portsmouth*. The vessel was observed on the 10th of *May* sailing from *Portsmouth* in company with many other ships amongst which was a convoy appointed for the *Mediterranean*. The *Union* was never afterwards heard of. The jury, presuming that she sailed with the *Mediterranean* convoy, found a verdict for the Plaintiff, subject to the question, Whether the sailing with that convoy was a sufficient compliance with the stat. 43 *Geo.* 3. *c.* 57.?

Best Serjt. having, in *Hilary* term last, obtained a rule *nisi* for a new trial,

Shepherd and *Onslow* Serjts, in shewing cause, first contended, that as there was no proof that the owner was privy or instrumental to the ship's sailing with the *Mediterranean* convoy, the case did not come within the act, and the verdict must stand. (*a*)

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(*a*) IN THE COMMON PLEAS AT LANCASTER.

HENDERSON and others *v.* HINDE.

The stat. 43 G. 3. c. 57. does not avoid a policy, on the ground of the ship sailing without convoy, unless the party interested in the insurance was privy to or instrumental in the sailing without convoy.

THIS was an action on a policy of insurance on the ship *Isabella*, with or without letters of marque, on a voyage at and from *Liverpool* to *Berbice*, the colonies on the continent, and any or all of the *Windward* and *Leeward* Islands, with leave to call at *Cork*, and to seek for and join convoy, at or off any ports and places in the *United Kingdom*, and in the *English* and *Irish* Channels. The policy contained a clause to return 2*l.* 10*l.* *per cent.* if the vessel should sail with convoy bound to the *West Indies*, and arrive. The cause came on to be tried before *Wood* B. at the *Lancaster* Summer Assizes, 1808, when the jury found a verdict for the

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MANSFIELD C. J. and LAWRENCE J. were clear that the point reserved at the trial could not have arisen, nor could the jury have found the verdict which they gave, unless they had first been fully satisfied that the Plaintiff was instrumental to the vessel sailing with the *Mediterranean* convoy. If that was not supposed, there was nothing to be considered on the act of parliament.

The counsel for the plaintiff then contended, that the sailing with any convoy which was bound on the same voyage

Plaintiffs, subject to the opinion of the Court on the following case.

The Plaintiffs were owners of the *Isabella*, and the Defendant, by his agent, subscribed the policy. *Cork* and *Falmouth* are places to which vessels sail from *Liverpool* to join convoy. This vessel, being unarmed, sailed from *Liverpool* for *Berbice* on the 19th day of *October* 1806, with intent to join convoy at *Cork*, to which place the Plaintiffs directed her to proceed for that purpose and *not to sail without convoy*; but the wind and weather proving unfavourable, she was compelled to put into *Falmouth*, where she arrived on the 7th of *November*. A squadron of vessels, bound for *Buenos Ayres*, but of which the destination was not then publicly known, was at that time about to sail from *Falmouth*, under the convoy of several ships of war. The master of the *Isabella* put himself under this protection, and received sailing instructions from Captain *Stafford*, commander of the *Spencer* ship of war, but without any place of rendezvous being appointed therein, in case of separation; and sailed from *Falmouth*, under such protection, on the 12th of *November*. The *Isabella* kept company with the squadron till the 25th of *November*, when she unavoidably, and without the fault of any body, parted company from the fleet, owing to a strong gale of wind; she continued to proceed on her voyage, and on the 21st of *December* was taken by a *Spanish* privateer in latitude 10. 30., longitude about 50., being a place beyond the point at which the convoys are usually directed to leave vessels bound for *Berbice*. The Plaintiffs did not direct the *Isabella* to sail, nor were they in any way privy to, or instrumental in, causing her to sail from *Falmouth* without convoy.

This case was argued in *Easter* term 1809, at *Serjeants' Inn*, before *Lawrence* and *Le Blanc* Js., by *Littledale* for the Plaintiffs, and *Jas. Clarke* for the Defendants.

After time taken to consider,

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voyage for a considerable part of the distance, was sufficient; and insisted on the inconvenience to the commerce of the country, which would follow from any other construction; since to many parts of the globe convoys were appointed only once or twice in a year, though numerous opportunities might offer of joining a convoy, which would protect the vessel for a great part of the distance. The *Mediterranean* convoy would protect this vessel as far as the *Azores*. Even in the stricter case of a warranty to sail with convoy, the warranty was satisfied by sailing with a convoy to such latitudes to which convoy is usually appointed, though short of the whole distance. As this was a highly penal statute, nothing was to be presumed against the Plaintiff, and it did not appear that the *Mediterranean* convoy had not orders to protect this vessel. The act contains two most material exceptions: by the one, vessels are permitted to proceed to join convoy; by the other, they are permitted to sail from port to port. If a sailing with the *Mediterranean* convoy, is not sufficient, it may fairly be presumed that the *Union* sailed from *Portsmouth* in pursuit of the *Quebec* convoy, which she might legally do; for if she might not pursue the convoy so long as there was any reasonable hope of overtaking it, neither could she have joined it if she had arrived in the *Downs* just as the convoy had broken ground, and was getting under weight; nor could ships come out of *Poole Plymouth*, or *Falmouth* to join the convoy as it passed; and it is therefore to be presumed that the *Union* was lost either while she was pursuing the *Quebec* convoy from port to port, or after she had joined it. [*Lawrence* J. observed that the convoy had orders to call for ships off the three ports mentioned, and that they were therefore ports of convoy.]

Best Serjt *contrà*, was stopped by the Court.

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MANSFIELD C. J. On the whole purview of the act, it appears that the sailing with convoy which it requires, must be a sailing with convoy for the voyage, or for so long a part of the voyage as convoy is ever appointed to go. In a letter which the captain wrote to the Plaintiff, he expressed a very faint hope that he should meet with the convoy at *Falmouth*. But he does in fact sail from *Portsmouth* to *Falmouth*, without a convoy bound for *Quebec*. It is argued that he may sail from port to port without convoy: but the act does not say that, *unless* he was *bound* from port to port. The exception in the 6th section is, for vessels *bound* from port to port. The next argument used is, that the captain may legally endeavour to overtake the convoy; but if he may try at all, why may not he continue to try, till the convoy is arrived within the last ten miles, or even the last mile of the voyage. Such a construction would wholly defeat the purposes of the act. This then is a sailing contrary to the act, and avoids the policy.

HEATH J. I am of the same opinion. It is impossible to support the present policy of insurance consistently with this act of parliament. A sailing with the *Mediterranean* convoy is not sufficient; but indeed it hardly appeared by the evidence, whether the ship sailed with any convoy at all. She was seen sailing with other ships, but there was no evidence of any sailing instructions having been given to her. It is said the vessel might legally attempt to overtake the convoy at *Falmouth*. But it was a mere supposition that the convoy might be there; and by the same reasoning, if the convoy had sailed from thence, she might pursue it further, without any limitation.

LAWRENCE J. I am of the same opinion. The same construction which has prevailed in questions upon po-

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licies, as to the meaning of a sailing with convoy, is the true construction of this act. The end of the act is, to protect the commerce of the country against the depredations of the enemy. The Lords of the Admiralty are the persons most likely to know what sort of protection will probably suffice for that purpose, and to what point it ought to continue. In some cases it is not necessary that it should continue for the whole voyage. But it is their province to regulate this point. That was the reasoning adopted by Lord *Mansfield* in the case of *Hibbert* v. *Pigou*, *B. R. Easter* term 23 *Geo.* 3. 2 *Park*, 6 edit. 443. and it seems applicable here.

CHAMBRE J. This case is within the terms, and obviously within the policy of the act, and though the act is to many purposes penal, yet it is to a certain degree a remedial act, directed to a great object of public policy, and we cannot do it away on account of the hardship of the case.

Rule absolute.

May 27.

ROBARTS and Another *v.* MASON and Wife.

An attorney sued with his wife for a debt incurred by her *dum sola*, loses his privilege. Nor is his wife entitled to be discharged out of custody on mesne process, if arrested with her husband.

THE Defendants having been arrested for a debt contracted, as it was sworn, by the wife while sole, *Best* Serjt. had on a former day obtained a rule *nisi* for discharging them both out of the custody of the sheriff, upon entering a common appearance, on an affidavit of the Defendant *Mason*, which stated that he was an attorney of this court, and that he believed the action was not commenced on account of any debt contracted by his wife while sole, but on account of some pecuniary transaction between the Plaintiffs and his wife since her

marriage,

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marriage, she being a bookseller and sole trader by the custom of *London*, and still dealing with the Plaintiffs, who were her separate bankers, under the same name which she bore before her marriage with the Defendant.

Shepherd Serjt. now shewed cause against this rule. When an attorney is sued for a debt of his wife, incurred before marriage, he loses his privilege. In every case where an attorney is sued *in auter droit*, he loses his privilege. *Powle's* case, *Dyer*, 377. It is the same whether he is sued for a debt of his wife accrued before marriage, or whether he permits her after marriage to trade under another name than his own, and incur debts as a *feme sole*.

Best Serjt. in support of the rule, contended that both were entitled to their discharge: the Defendant, a practising attorney, is sued in a plea in which his wife must necessarily be joined, the debt having been contracted before marriage. The reason of *Powle's* case was, that he, being a clerk of Chancery, and sued with his wife in this court, claimed his writ of privilege for himself and her: it was refused, because the wife had no privilege of Chancery, nor was she compellable to answer there. A member of the House of Commons cannot be arrested, but he may be sued, and common process shall issue against him. So a wife may be sued with her husband for her debt contracted before marriage, but she cannot be arrested; and in this very term the Court made a rule absolute with costs, to discharge a *feme covert* who was sued in the same writ with her husband, for a debt of the wife contracted before marriage. (*a*)

(*a*) *Newcome* v. *Hornblower*. In that case the husband had not been arrested, but the wife was arrested alone.

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MANSFIELD Ch. J. In this case no proceedings could be had against the husband, otherwise than jointly with the wife: and how could the Plaintiffs proceed against the wife by attachment of privilege? They could proceed against the husband and wife jointly, by the common writ only. And if that is the proper process, then the arrest follows. An attorney is not entitled to his privilege when he is sued with his wife for a debt incurred by the wife before her marriage.

HEATH J. An attorney, if sued with another, loses his privilege: otherwise there must be two actions instead of one. The Plaintiff may arrest both husband and wife, and the husband must put in special bail for both. Formerly, even in parliament, the privilege was not allowed to a member when he was sued with another; and it is within my memory, that the late Mr. *Wallace* advised a proceeding under the supposition that this order was not obsolete, in consequence of which he received notice that a motion would be made against him in the House of Commons.

LAWRENCE J. There could not be two separate actions against the husband and wife for this cause: therefore the course which the Plaintiffs have pursued is proper. The following is a manuscript note of the late Mr. Justice *Gould* on the practice. "Special bail: *feme covert.* Not; unless the husband is also arrested, and then special bail shall be put in for both. But she must be clearly a wife: *aliter* if dubious, or if she has acted as a *feme sole.*"

Rule discharged.

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KINDERLEY, Demandant. DOMVILLE, Tenant. Sir C. W. BAMPFYLDE Bart. and G. W. BAMPFYLDE Esq. Vouchees.

May 27.

A common recovery may be amended by adding the name of a parish in which part of the premises lie, if it is sworn that the parish is wholly within the same county.

And by inserting the entirety of the premises not comprized in the deed to make a tenant to the *precipe*, and comprized in the recovery by the description of moieties only, if the conveying parties are all alive and consenting, and it is sworn they intended the premises should pass.

AN indenture of bargain and sale enrolled, for making a tenant to the *precipe*, to the intent that a common recovery might be suffered, comprised (*inter alia*) the manor of *Rampisham*, a capital messuage and farm, and divers messuages, mills and tenements, late in the possession of *J Wallace*, in the parish of *Rampisham*; the moiety of the manor of *Chilfroom*, a farm and divers tenements in *Chilfroom*, late in the possession of *G. Gollup*, and a moiety of divers messuages, farms and tenements in *Chilfroom*, all in the county of *Dorset*, and also all other the manors, hereditaments, moieties, and shares of hereditaments, of the bargainors, Sir *Charles Warwicke Bampfylde* and *George Warwick Bampfylde*, or either of them in the several parishes of *Rampisham*, *Chilfroom*, and *Wraxall*, or elsewhere in the county of *Dorset*. The recovery suffered was of the manor of *Rampisham*, 325 acres of land, 200 acres of meadow, 105 acres of pasture, and 60 acres of wood, a moiety of the manor of *Chilfroom*, a moiety of 40 messuages, 5 mills, 37 gardens, 339 acres of land, 220 acres of meadow, 231 acres of pasture, and 30 acres of wood, in *Chilfroom*, *Rampisham*, and *Wraxall*.

Shepherd Serjt. moved to amend this recovery by substituting the following description. "The manor of "*Rampisham* with the appurtenances, and a moiety of "the manor of *Chilfroom* with the appurtenances, *and* "50 *messuages*, 50 *gardens*, 20 *mills*, 650 *acres of land*, "400 *acres of meadow*, 400 *acres of pasture*, 100 *acres of* "*wood*, 100 *acres of furze and heath*, and likewise a

 "moiety

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"moiety of 40 messuages, 5 mills, 37 gardens, *&c.*" as before, "with the appurtenances, in *Rampisham, West* "*Chilborough*, and *Chilfroom*." He moved this upon an affidavit, which stated, that it was intended to comprise in the recovery all the parcels mentioned in the said indenture; but that by mistake the messuages and mills in *Rampisham* were omitted: and further, that by a mistake in the indenture itself, a tenement in the occupation of *J. Wallace* was described as being in *Rampisham*, when in fact, although within the manor of *Rampisham*, it was situate in the parish of *West Chilborough*; and that by a further mistake, the deed specified only one messuage or farm in *Chilfroom*, formerly in occupation of *G. Gollup*, but that in fact Sir *C. W. Bampfylde* and *G. W. Bampfylde* were at the time of executing the said deed possessed of divers entire messuages, farms, lands, tenements, and hereditaments in *Chilfroom*, which were intended to be comprised as well in the bargain and sale, as in the recovery; but which are omitted in the bargain and sale, and described in the recovery as moieties only; and that the parties were all alive, and consenting to the amendment.

The Court having first required an affidavit that the parish of *West Chilborough* lay wholly within the county of *Dorset*, permitted the amendment.

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May 28.

HUNT *v.* BRIDGEFORD.

The Plaintiff shewed the Defendant's affidavit, made for the purpose of changing the venue, to be untrue, and the cause of action arising in more counties than that in which the venue was laid, the Court retained the venue upon the Plaintiff's undertaking, in the alternative, to give material evidence in some one of the counties where the cause of action arose.

BEST Serjt. had on a former day obtained a rule *nisi* to change the venue from *London* to *Lancaster* upon the usual affidavit that the cause of action arose in *Lancaster*, and not in *London*, or elsewhere.

Shepherd Serjt. shewed cause, upon an affidavit that the cause of action arose in *Surry*, *Middlesex*, and *London* and no part thereof in *Lancaster*, or elsewhere; and that the action was brought for goods sold by the Plaintiff, residing in *Middlesex*, and delivered to the order of the Defendant, part at *Cotton's* wharf in *Surry*, and the residue in *Cripplegate*, in *London*. He therefore prayed, that as he had falsified the Defendant's affidavit, he might be permitted to retain the venue, without an undertaking to give material evidence in *London*; and he cited *Gailland* v. *Champion*, 7 *T. R.* 205.

Best, *contrà*.

HEATH and CHAMBRE Js. were inclined to think the undertaking ought to be required, in order to support an uniformity of practice.

LAWRENCE J. observed, that in 1 *H. Bl.* 216. *French* v. *Coppinger*, an affidavit that the cause of action arose where the venue was originally laid, was held not sufficient to retain the venue, without an undertaking; and the practice had been thought so essential, that in order to satisfy the exigency of a particular case, Lord *Loughborough* C. J. considered evidence that the cause of action arose in *France*, to be a satisfaction of the undertaking

to

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to give material evidence in *London*. *Gerard* v. *De Roebeck*, 1 *H. Bl.* 280.

Cur. adv. vult.

MANSFIELD C. J. on this day observed, that in the case of *Collins* and *Jacobs*, 3 *Bos. & Pull.* 579. no such undertaking had been required, and although the subsequent case of *Clarke* v. *Reed*, 1 *New Rep.* 310. might in some measure seem to shake the authority of that decision, it was not contrary to it; for the chusing of the assignees in *London* was certainly no part of the cause of action, but a subsequent matter. In this case, it would be very hard, if a man who has two causes of action, the one in *Surry*, and the other in *London*, should, unless he undertakes to give evidence in both, or even in of those counties exclusively, be obliged to carry his cause to be tried in *Lancaster*. The object of the undertaking was only to give such evidence, as would shew the falsehood of the affidavit made to change the venue, and since that had been done here, it was fit that an alternative undertaking, to give material evidence either in *London* or *Surry*, should be held sufficient to discharge the rule. The alternative must not include *Middlesex*, for the goods never came to the Defendant's hands there.

Rule discharged, the Plaintiff undertaking to give material evidence in *London* or in *Surry*.

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ANSCOMB v. SHORE.

May 30.

If a commoner prescribes in right of a particular messuage, to have done by the Defendant for his benefit, a certain act which is beneficial to all the commoners, another commoner, who claims by a similar prescription in right of another tenement, and not by custom, is not a competent witness to prove the charge.

No action lies against one who distrains cattle damage feasant, for impounding them, instead of accepting a compensation for the damages tendered before the cattle were impounded.

THE Plaintiff prescribed for common of pasture upon *Hampton* common for all cattle levant and couchant upon his ancient messuage, *&c.* as appurtenant thereto, and declared that the Defendant was bound by reason of his occupation, to repair the fence of his close contiguous to the common, and permitted it to be ruinous, whereby the Plaintiff's cattle escaped into the close for defect of fences, and the Plaintiff lost the use of them. Another count stated that the Defendant had taken the Plaintiff's cattle damage feasant, and that while he was still in possession of them, the Plaintiff tendered him 10s., which was a reasonable compensation, and requested him to restore the cattle; and although the Defendant could and ought to have accepted the compensation, and restored the cattle, he detained the same until he had compelled the Plaintiff to pay the larger sum of five guineas in order to regain the possession of them. The Defendant pleaded the general issue. At the trial of this cause the Plaintiff called four witnesses, inhabitants of *Hampton*, who deposed, that all inhabitants in *Hampton* paying church and poor, had a right to turn their cattle upon the common. He was proceeding to call other witnesses, but they being also inhabitants, the Defendant objected that none of them were admissible, upon which the Plaintiff submitted to a nonsuit.

Sellon Serjt. on a former day had moved to set aside the nonsuit on two grounds. 1st, That he was entitled to recover on the last count: but the Court were clear that the action would not lie. [*Heath* J. compared this to the attempts which had been sometimes made improperly to introduce the action for money had and received;

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ceived; if it could be permitted, it would put an end to all special pleading.] 2d, Whatever absurd notions these witnesses might entertain of the nature of their common rights, they were not called with the intent to prove a general common right in all inhabitants, nor any customary right, but only a prescriptive right appurtenant to a particular tenement, and in such a case it is no objection to the competency of a witness, that he is a commoner in respect of another tenement. The Court granted a rule *nisi* upon this ground.

Shepherd Serjt. would now have shewn cause, but was stopped by the Court.

Best and *Sellon* Serjts., in support of the rule, admitted, that in a case where right of common was claimed by custom, these witnesses could not have been heard; but where the claim is by prescription, in right of a particular tenement, insomuch as the record of the judgment could not be evidence for or against them in any actions of their own, to which it is essential that both parties to the record must be the same, they were admissible witnesses. The question merely was, whether the owner of the adjacent land, or the commoner, was to repair this hedge. From the very nature of the interest, it cannot lie upon the commoner to repair it.

The Court held, that the question to be considered was whether the commoners, having a common interest in the preservation of this hedge, could be competent witnesses for each other. It might be, that no one was bound to repair it. It might be, that a hayward was usually paid by the commoners to keep their cattle on the common. But the production of this record would be evidence for another commoner that the occupier of the adjacent land was bound to repair this fence. The commoner therefore

fore would derive an advantage, by exoneration himself from the charge of maintaining a hayward, if he could throw on this Defendant the charge of repairing the hedge, and consequently he was interested in the event of the suit, and properly rejected.

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Rule discharged.

DOE, on the Demise of SARAH THWAITES, MATTHEW NEED and MARGARET ANN his Wife, and THOMAS THOMASON, v. JOHN OVER, ANN ARMSTRONG Widow, WILLIAM GEORGE BATES, and WILLIAM GAZELEY.

May 30.

Under a devise of freehold property to *the relations on my side*, all those shall take who would be entitled to personal estate under the statute of distributions.

As well in the maternal, as in the paternal line.

And the devise speaks, at the time of the testator's death, not at the time of framing the devise.

Therefore one, who was related in equal degree at the time of making the will, having died before the testator, leaving a son, the son was held not entitled to a share, as a relation.

THIS was an ejectment for certain messuages in *Middlesex*, tried before *Mansfield* C. J. at the Sittings after last *Hilary* term at *Westminster*, when the jury found a verdict for the Plaintiff for two-thirds of the premises, subject to the opinion of the Court upon the question, whether the Plaintiff's lessors were entitled to any and what proportion of them, under the circumstances of the following case.

Thomas Cox, being seised in fee of the premises, as a purchaser thereof, by his will duly attested, "devised, and bequeathed all such property as he should be possessed of at his decease, (except his freehold estates,) to his wife *Mary Cox* as to be her sole property. And he gave to her all his freehold estates during her natural life, and at her decease to be equally divided amongst *the relations on his side*. And he did at present desire his wife to give to his *nearest relation on his side* five pounds, to be paid to him by her soon after his decease." The testator died,

leaving

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leaving his widow surviving him, and his nearest relations, three first cousins, *viz.* Mrs. *Barrett* his father's sister's daughter, and *Aynsworth Thwaites*, and *Ann Thwaites*, his mother's brother's children. The two latter died during the life estate of the testator's widow. When the testator died, his heirs at law were Mrs. *Barrett* and *John Gifford*, Mrs *Barrett's* sister's son: *Sarah Thwaites* and *Margaret Ann Need*, two of the lessors, were the heirs at law of *Aynsworth Thwaites*; and *Thomas Thomason*, the other lessor, was the heir at law of *Ann Thwaites*.

Best Serjt. in support of the verdict, observed, that the word "relations," considered by itself, takes in all who are in equal degree, and must alike comprehend the maternal and paternal line. The words "on my side" create a necessity of contrasting some one class of relations with another; but the obvious meaning is, that the testator meant to contrast his own relations, both maternal and paternal, with those of his wife, to whom he had absolutely bequeathed all his personal estate; and therefore, contemplating that it would probably go to her relations, he directs that his freehold estates, which also he had given her for her life, shall after her decease be divided amongst the relations on his side. It is plain that he did not mean to die intestate as to this property, he has peculiarly excluded the heir at law by the word "relations;" and the words "equally to be divided," clearly shew that the testator destined the estate to more than one, and therefore did not mean to confine it to his father's sister's daughter. *Anon.* 1 *P. Wms.* 327., where one devises his personal estate to his relations, without saying what relations, it shall go to all such as would take by the statute of distributions. Therefore by relations generally, are meant the nearest relations. *Davis* v. *Bayley*, 1 *Ves.* 84. *Pyot* v. *Pyot*, 1 *Ves.* 336. There it

was

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was a devise of real and personal estate to the nearest relation of the testatrix of the name of *Pyot*, and the argument in favour of the heir at law, drawn from the uncertainty, was much pressed; Lord *Hardwicke*, Chancellor, said, "A devise is never construed absolutely void for uncertainty, but from necessity." He admitted "that if there were a necessity to take the devise to relate to a single person, there might be such uncertainty there, but he did not take it so, but held that *relation* was *nomen collectivum*, as much as *heir* or *kindred*." Here that difficulty does not exist, for the devise is to relations, in the plural, and where the testator means to give a legacy to one, he uses the word relation in the singular. The case of *Taylor* v. *Sayer*, *Cro. El.* 743. which was a devise to his issue, and held void, is noticed by *Bridgman* C. J. in the case of *Bate* v. *Amherst*, *T. Ray*. 83. and is denied to be law. In *Wild's* case, 6 *Co.* 17. *b.* it was held that a devise to a man "and his children" should have given an estate tail to the father, if no children had been *in esse*, but that, the children being *in esse*, all the issue took a joint estate for life. *Crosley* v. *Clare*, *Amb.* 397. was a devise of freehold to descendants, and Sir *Thomas Clarke*, M. R. held it to extend to all who proceeded from the body, and said that the Court had no other rule to go by, than the statute of distributions, for expounding the word "relations."

Heywood Serjt. *contrà*. Either the devise is to be restricted to the relations *ex parte paternâ*, or is wholly void for uncertainty. A bequest of personal property "to relations" would have been void for uncertainty before the statute of distributions, and now the analogy from that act is only applied, because a court of equity considers such a bequest as an intestacy. But another step must be gained, before the same rule can be applied to real estate. For there, unless it is clearly shewn by

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by the devise who shall have the estate, the heir shall have it. In the case of *Pyot*, v. *Pyot*, Lord *Hardwicke* was glad to avail himself of something arising upon the face of the will, in order to solve the difficulty, and said, "as the "testator has by the word relations indicated, by the aid "of the statute, to whom his personal property shall go, "we will follow that indication of his will, and give "the real estate to the same persons." But no such clue is afforded here, for there is no bequest of personal property to his relations. The words "on my side" render the devise yet more uncertain. The testator evidently means to exclude some persons, and either they must be his maternal relations, or the uncertainty is complete. The cases upon real estate devised to "relations" are few. 3 *July* 1732, by the Master of the Rolls, —Under a limitation to the family of *J. S.* the real estates descend to the heir at law, the personal estate goes to the next of kin. *MS. note*, probably of the late Mr. *Cox*, but the decree of that day, upon search, has not been found. *Roach* v. *Hammond*, *Prec. Chan.* 401., was a devise of real and personal estate to "relations;" but the relations filed a bill for the personal estate only, which shews they did not think themselves entitled to the real estate. [*Mansfield* C. J. observed, that equity was the proper jurisdiction for the recovery of the personal property, but unless the real estate was burthened with some trust, the Plaintiff would resort to a court of law to recover it in ejectment: therefore no inference could be drawn from this case.] "*Cambridge* Spring Assizes 1806, before *Grose* J. *Doe, on the Demise of Lincoln*, v. *Flower and Others*. Ejectment for divers messuages brought by the heir at law against the devisees in possession under the will of *Robert Farthing*, upon the ground that there was such uncertainty as to avoid the devise, which was "to my "brother and wife for their joint lives, and after their "decease, to be equally divided between my relatians "and

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"and their relations." The wife died first; upon the testator's decease, *Robert Castle*, the brother, who was executor possessed himself of the title deeds. The Plaintiff obtained a verdict, and entered into possession The case was not afterwards moved. He then filed a bill against the executors of *Robert Castle*, to get possession of the title deeds. The Defendants, in their answer, declare their readiness to obey the order of the Court, and upon the hearing before the Master of the Rolls, on the 10th of *July* 1807, a decree was made that they should accordingly give up the deeds." In the case of *Crossley* v. *Clare*, Sir *Thomas Clarke* thought the word "relations" was too large for a devise, unless the statute could be called in aid. In *Chapman's* case, *Dyer*, 333., the doctrine of real estates is well explained. The words there were, "I will the house that *T. Chapman* liveth in, to him, and he to pay to *C. C.* 3*l.* 6*s*, 8*d*. and else to remain to the *house*. Provided always, that the houses be not sold, but go unto the next of the name and blood that are males." And it was held that the son of *Thomas* took an estate-tail; and that by the word "house" the family was intended, and the most worthy and oldest person of the family. The safe rule then is, that upon such a devise of personal estate, the law for the distribution of personal estate shall attach, but that the law which regulates the descent of real estate shall attach upon a similar devise of real estate. And the premises in question must therefore descend to the paternal heir. No case has been cited in which the statute of distributions has been called in aid to interpret a will which disposes of real estate only, and such an interpretation would introduce a course of descent unknown to the law.

Best, in reply. The rules of descent will remain wholly unaltered by the construction contended for: the statute

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statute is relied on only to interpret the *descriptio personæ*. If the word "relations" is properly so construed with reference to one description of property, it must bear the same meaning with reference to all other descriptions of property. In the case of *Pyot* v. *Poyt*, both sorts came under consideration: and the case of 1732, if at all applicable, must be considered as over-ruled by that decision, but it does not appear what were the words of the will there. The five pounds are given clearly to a male, and he must be the nearest relation; if then *Aynsworth Thwaites* was entitled to this, as the Defendant has contended, it would be inconsistent that in one part of the will "relation" should mean a cousin *ex parte maternâ*, and in the next clause should be deemed to exclude him. If that bequest is collective, this case completely coincides with that of *Pyot* v. *Pyot*, and calls in aid the statute to explain who are "the relations," for the purpose of taking the legacy, and so points out to whom the freehold property shall go. The case in *Dyer* does not apply, for there it was plain the testator meant that his property should not be divided, but should remain entire to the head of his family. The case of *Doe* v. *Flower* was a mere *nisi prius* decision, and ought not to overthrow well established authorities: it was also meterially distinguishable, for there was no personal property to introduce the assistance of the statute of distributions. That devise too might well be void from uncertainty, being much more disputable than this, for it might be contended to comprehend any or all of five families, the testator's, his brother's, who might be only his half-brother, and his wife's, as well on the father's as on the mother's side. It is not true that in the cases cited, there has been a *quasi* intestacy: the statute of distributions has been called in, not to supply the will, but to interpret it.

Cur. adv. vult.

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MANSFIELD C. J. now delivered the opinion of the Court.

(After referring to the language of the will,) Perhaps the strongest argument against the devise, is, that it is uncertain. The question here turns upon the expression "relations on my side:" the testator has not in this passage said "my nearest relations." In another part he gives five pounds to his nearest relation. The state of the family does not throw much light upon this latter clause; but we may guess that he mean *Aynsworth Thwaites*, who was his nearest male relation. If in the latter part he meant him, the word "nearest" equally applies to the other maternal cousin in the same degree, who is one of the lessors of the Plaintiff, which is an argument against rejecting the maternal line. Now although relation is a word of very vague and general import, yet it has obtained a certain degree of ascertained meaning in the courts where questions of this sort have arisen with respect to personal property; that is, it means those who are entitled to take as relations under the statute of distributions. This rule of interpretation has been adopted to controul the more extensive and lax sense of the word. The term then having obtained this construction in courts of equity, I do not see why it should not obtain the same construction in courts of law; and if so, the consequence is clear, that the three first cousins who were living at the time of the testator's death, are entitled to take. *Pyot* v. *Pyot* is a strong case, and goes to a length which rather startled me at first. I did not before know that relation was *nomen multitudinis*, and to be applied to kindred in the plural as well as in the singular, but Lord *Hardwicke* says it is. There is no difference between that case and this, except that there the will distributed personal as well as real property. Adopting this sense of the word, I neither see any other persons who are entitled to take, nor such a

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degree of uncertainty as to prevent the devise from taking effect. The words "on my side," cannot exclude the maternal relations, for it is impossible to contend that the mother is not as nearly related to the devisor, and as much on his side, as the father and the paternal relations. In respect to the proportion which the Plaintiff is to recover, the devise speaks at the time of the testator's death: there are cases where estates have passed away from the children of the eldest son. Suppose a devise to *A.* for life, remainder to his first and other sons in tail male; if the first son of *A.* dies in the testator's lifetime, his son cannot take. Various reasons have been given why after-purchased estates should not pass by a devise, but I do not understand that the true reason is, because the devise is supposed to speak at the time when it is penned. Lord *Mansfield* said, a will was an appointment to uses, and therefore could not operate on that which was not then in seisin. *John Gifford* is not entitled to any share, he is too remote, and the verdict must stand for two-thirds of the premises.

Postea to the Plaintiff.

Williams *v.* Nunn and Another.

May 30.

If a trader, whose house of trade is in *Ireland*, comes to *England* on business, and again quits this country to avoid an arrest by a creditor, it is such a departing the realm as to constitute an act of bankruptcy.

An intent to delay a creditor makes the leaving the realm or dwelling-house an act of bankruptcy: it is not necessary that a creditor should actually be delayed.

A trader in *London* purchases goods to be sold by *A.* and *B.*, partners in trade in *Dublin*, and charges them to *A.* and *B.* at prime cost; this creates a debt due from *B.* in *England*, and makes him a trader here.

THIS was an action of trover, brought under an order of the Court of Chancery, to try the validity of a commission of bankrupt, which had issued against the Plaintiff.

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Plaintiff. Upon the trial of the cause before *Chambre* J. at *Guildhall*, at the Sittings after last *Michaelmas* term, it appeared that the Plaintiff had originally been partner in trade in *London* with a person named *Morgan*, under the firm of *Morgan* and *Williams*; that this partnership had been dissolved, and an agreement entered into between the parties, to the effect that *Morgan* should, from that time forward, carry on trade in *London* upon his own sole account, and that the Plaintiff should establish and conduct a house of trade in *Dublin*, under the firm of *Williams* and *Morgan*, in the profits of which *Morgan* should equally participate; that all goods ordered by *Williams* to be purchased by *Morgan* in *England*, and sent by him for the use of *Williams* and *Morgan*, to be sold in *Dublin*, should be charged by *Morgan* to the firm of *Williams* and *Morgan* at the prime cost only. It did not appear that the creditors in general were ever apprized of this alteration. The Plaintiff having come over to *London* for the purpose of making some arrangement with his creditors, was informed, a few days before the time which he had fixed for a meeting with them, that a person named *Clarke* was about to arrest him on the following day. *Clarke* had furnished to the order of *Morgan*, goods, which had been sent to *Williams* and *Morgan* for sale, *Clarke* knowing, when he accepted the order, that they were destined for *Williams* and *Morgan*, and having credited them in his books. *Morgan* sent the goods to *Williams* and *Morgan* without charging any profit on them. The Plaintiff, in consequence of this intimation, immediately returned to *Dublin*, to avoid being arrested. During the whole of his residence in *Dublin*, he had continued to keep his former house in *London*, his name was upon the door, and his wife and family had continually resided in it. *Best* Serjt. for the Plaintiff, contended that this was no act of bankruptcy. 1. Because the Plaintiff not being do-

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miciled, nor carrying on trade in this country, but in *Ireland*, could not be said to depart the realm, by returning to *Dublin*. And, 2. That whether he were domiciled in *England* or not, still, as the goods had never been ordered from *Clarke* by *Williams*, but by *Morgan* only on his sole account, *Williams* was not indebted, and therefore his flight, in order to avoid an arrest by *Clarke*, was not an act done to the intent or whereby his creditor should or might be delayed, for that it was done with intent to avoid an illegal and vexatious proceeding; and no creditor of *Williams* was in fact delayed by it, which was an ingredient necessary to constitute an act of bankruptcy. *Chambre* J. directed the jury, that the act of bankruptcy by departing the realm, mentioned in the statute, had no connection with committing an act of bankruptcy by departing from the dwelling-house; that the statute was not restrained to such persons only who reside here; but extended to all natural-born subjects; it was not material, therefore, whether *Williams* had a residence here or not, provided he was here, having dealings with his creditors: and if they believed the evidence, here was a departure for the express purpose of avoiding the creditors. That, looking at the situation of the parties, and their partnership, it was immaterial whose name was in the firm, the goods were furnished by *Clarke* on the account of *Williams* and *Morgan*, for the *Dublin* trade; that there was no reason, therefore, to restrict the creditor to the funds of *Morgan* only, but that he had a right to resort to the *Dublin* house for payment. The jury, under this direction, found a verdict for the Defendants.

Best Serjt. having, in *Hilary* term last, obtained a rule *nisi* for a new trial, upon both the grounds which were urged upon the trial,

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Shepherd and *Vaughan*, Serjts., on a former day, in shewing cause upon the first point, relied on the authorities of *Dodsworth* v. *Anderson, T. Ray.* 375. *Bird* v. *Sedgwick*, 1 *Salk.* 110. *Exparte Smith*, *Cowp.* 402. *Ex parte Williamson*, 1 *Atk.* 82. and *Alexander* v. *Vaughan*, *Cowp.* 398. In discussing the second point they commented on the words of the statutes 13 *Eliz. c.* 7. *s.* 1. 15 *Jac.* 1. *c.* 15. *s.* 2. and 21 *Jac.* 1. *c.* 19. and the cases of *Fowler* v. *Padget*, 7 *T. Rep.* 509. *Garratt* v. *Moule* 5 *T. Rep.* 575. *Barnard* v. *Vaughan*, 8 *T. Rep.* 149. and *Inglis* v. *Grant*, 5 *T. Rep.* 530.

Best, *Clayton*, and *Onslow*, Serjts., in support of the rule, relied upon the same arguments on which the rule had been obtained, and on the authority of the four last mentioned cases.

Whether a departing the dwelling-house be accompanied with an intent to delay a creditor, is a question of fact for a jury to decide, upon all the circumstances.
If it be not accompanied with such intent, it is no act of bankruptcy.

They also cited the case of *Aldridge and Another* v. *Ireland*, *B. R. Easter* term 24 *Geo.* 3., which was "An action of trover, tried before Lord *Mansfield* C. J. "and brought by the assignees of a bankrupt to re-"cover against the sheriff of *Somersetshire* the value of "certain goods sold under an execution against the "bankrupt. *Lee*, *Cooper*, *Erskine*, and *Bower*, shewed "cause against the new trial. *Peckham* and *Russel con-"tra.* Two points were made in the argument: 1st, "Whether trover would lie in this case against the "sheriff, the goods having been duly taken by the "sheriff and sold by him before the commission. 2d, "Whether there was in this case any act of bankrupt-"cy. At the trial it was considered, and at the time "of shewing cause it appeared by the affidavit of the "Defendant upon which the rule was moved, that the "sheriff was indemnified in this action by *Clinton*, the "judgment creditor, and therefore the first point was "not material. On the 2d point, Lord *Mansfield* stated "the evidence: the material facts were, that *Alice*

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" *Wall*, the bankrupt, being indebted to *Clinton*, her " brother-in-law, executed a warrant of attorney to " confess a judgment, in which were included several " bills for which *Clinton* was liable, but which were not " then due; that *Clinton* sent an execution down to the " bankrupt's house at *Bath*, where she carried on her " trade, and took possession of all the stock. *Alice Wall*, " on the *Sunday* afternoon, two days after the execution, " told her servants that she was going to *London*, to " persuade her brother to withdraw the execution; and " that if any person inquired for her, he was to be di- " rected thither: and she set off for *London* that after- " noon, came to the house of her brother, was visible " there, and twice arrested. A letter of *Alice Wall* " was read, which had been written before she left " *Bath*, and was directed to *Clinton*, stating that the " *Bath* bankers refused any longer to discount her bills, " and that she had no means of raising a guinea, and " inquiring of him what she should do. A letter from " *Clinton* was also read, (which, it was admitted, could " not be evidence, but on the supposition that this was " really the defence of *Clinton*, and that the sheriff was " merely nominal,) in which he informed one of her " creditors that his sister had committed an act of bank- " ruptcy by leaving her house, and desired that person " to become the petitioning creditor, and to go directly " to *Bath*, where he would find *Clinton's* attorney. " The jury found that there was an act of bankruptcy, " and gave a verdict for the Plaintiffs to the amount of " the goods.

" The first point was now again insisted upon, as well " as the second, on behalf of the Defendant.

Sheriff, in what cases entitled to the protection of the Court.

" Lord MANSFIELD C. J. If this were really the case " of a sheriff, who had acted fairly under a writ, with- " out notice of any act of bankruptcy committed, there

" are

"are several rules established in the case of *Cooper* v. "*Chitty*, 1 *Burr*. 20. for his protection; but if the sheriff voluntarily takes a part, and, either before or after "the goods sold, elects to which party he shall pay the "money, and receives either an express or implied in-"demnity, (for either is sufficient,) he must resort to "that party for his security in case he has acted wrong, "and is mistaken. It was taken for granted at the trial, "that the sheriff had notice of the commission, and had "his indemnity, or might have had it, and that he was "nominal only; if that is not so, it may be a ground "for a new trial, because the whole proceeded on that "supposition: but it appears now from the affidavits, "that he was actually indemnified. The material ques-"tion is, as to the act of bankruptcy; I thought it very "doubtful at the trial, and I think so still. It is a ques-"tion for the jury, with what intention she left her "house; and it is a very strong circumstance that be-"fore she went, she left word with her servants for "what purpose she was going, and directed all persons "to seek for her at the place where she actually was.

"WILLES J. thought that the facts stated did not "amount to an act of bankruptcy: the truth of the ac-"count, and her being actually arrested upon that in-"formation, contradicted the notion that she went to "avoid her creditors.

"ASHHURST J. thought that there was no intention "of leaving *Bath*, for the purpose of delaying her cre-"ditors; and though she never afterwards returned "thither, yet if she went for the purpose of settling the "business with her brother, her not returning could not "make that to be an act of bankruptcy, which was "not so originally.

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" BULLER J. When a leaving of the house is or not
" not an act of bankruptcy, must depend on all the circumstances. The going to a distant place among strangers may be an act of bankruptcy, though the party be visible there: the going only to the next house may be an act of bankruptcy, if the party is not visible; there is no line to be drawn, without knowing the circumstances. The intent must be collected from them. The circumstances here are strong to shew that she left her house really with the view which she expressed, and I think that was not an act of bankruptcy.

" Rule absolute for a New Trial,
" on Payment of Costs."

MANSFIELD C. J. observed that this case materially differed from that in which it was first cited, of *Fowler* v. *Padget*: there the bankrupt absented himself for ten days, and many creditors called with bills, and could not find him. Here it appeared that the creditor had only to call at her house, in order to know where she was, and to be enabled to get a writ, and arrest her at her brother's house in *London*.

CHAMBRE J. remarked, that it might be collected from the language of *Willes* J. in this case, that the creditor had actually called at her house at *Bath*, and not finding her there, had, by the direction which he there obtained, followed her to *London*, and arrested her.

Cur. adv. vult.

MANSFIELD C. J. on this day delivered the opinion of the Court.

Although Lord *Kenyon* once hastily determined that there must be some proof of avoiding or delaying a creditor, yet in a subsequent case, which, came before me at *Chester*, where the same point arose, and I ruled it contrary, a new trial was afterwards moved for in

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in the Court of King's Bench upon the authority of *Fowler* v. *Padget*; and the Court would not even grant a rule *nisi*. In the case recently decided of *Robertson* v. *Liddell*, 9 *East*, 487. it was determined, that in order to constitute an act of bankruptcy by keeping house, it was sufficient to shew that the bankrupt intended to delay his creditors, without shewing that any delay actually was occasioned; and that decision is applicable here. As to the other question, Whether the Plaintiff is to be considered so far subject to the bankrupt law of this country, as to be capable of committing an act of bankruptcy by leaving the realm? it does not exactly appear how long he was here, before he again returned to *Ireland*; but on the facts of this case, he is as little a resident out of this country, and as little entitled to take that objection, as can well be supposed. Here the persons who composed the firm of *Morgan* and *Williams* continued partners throughout, they never for a moment ceased to be partners: the only change was, that they substituted the trade in *Ireland* for that in *England*. In consequence of this trading a debt becomes due. It is impossible to argue with success that this is not the debt of *Williams*. Even if *Williams* had never been known here as a partner, but it had afterwards appeared that he was a partner, and that the trade was carried on for the joint benefit of both, there could be no doubt of his liability. But the trade is carried on expressly for *Williams* and *Morgan*. Although *Morgan* acts in this country, it is not for himself alone, but for *Williams* and *Morgan*, Where then does the debt arise? Evidently in *England*. The Plaintiff comes to *England*, he lives a great part of the year in *England*, his family is here, he comes hither in consequence of his embarrassments, for the purpose of settling his affairs; and while he is here, a considerable creditor of *Williams* and *Morgan* is, as the Plaintiff thinks, about to arrest him. He instantly quits *England*

and

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and returns to *Ireland*. Is not this then an act of bankruptcy? Several of the cases cited, and particularly that of *Alexander* v. *Vaughan*, shew that he may be arrested here, and that if he lies in prison two months, he will be a bankrupt. To avoid an arrest he runs away, and it is said, this makes a distinction. I will suppose that in returning to *Ireland*, he is going to his home and place of trade; but he does not go as for the purpose of going home; by his own confession, it is to avoid this arrest. If he was not liable to the bankrupt laws of this country immediately upon his landing here, how long was it necessary that he must stay before that liability would accrue? Every man coming hither, knows that he must be subject to the law, and any personal contract which he makes, may be enforced according to law: it seems then to be, and is, a necessary consequence of this, that if, to avoid the process of the country, he goes away, so that no proceedings by action can be had against him, he shall be nevertheless liable to the other mode which the law points out, namely, a commission of bankrupt. It would be extremely difficult to say that an alien born would not be so subject. The cases go the full length of establishing this doctrine; the only distinction is, that *Williams*, instead of being arrested here, escaped to *Ireland*, but that does not make any material difference. We are therefore of opinion that the Plaintiff is a bankrupt, and the rule must be

Discharged.

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BALLARD *v.* DYSON.

May 30.

Evidence of a prescriptive right of way for all manner of carriages does not necessarily prove a right of way for all manner of cattle.

But it is evidence of a drift way, for the jury to consider, together with the other evidence.

The extent of the usage is evidence of a right only commensurate with the user. By 3 against *Chambre* J.

User of a way for carriages and hogs is *primâ facie* evidence of a right of way for all cattle, and the *onus* of proving the restriction lies on the grantor. *Per Chambre* J. against 3.

Whether a way of necessity is commensurate only with the use to which the premises are applied at the time of the conveyance, or with all uses to which they may be converted afterwards, *quære*.

IN replevin the Defendant avowed taking a heifer damage feasant. The Plaintiff pleaded a right of way to pass and repass with cattle from a public street through and along a certain yard and way adjoining to the said place, in which, &c. towards and unto certain premises in his own occupation, as appurtenant thereto, at all times, 1. by prescription; 2. by a grant from a person in whom he supposed the seisin in fee, as well of the yard and way, as of the Plaintiff's premises, to have been united. The Defendant, in his replication, took issue upon these rights of way. Upon the trial of this cause, at *Hertford* Summer Assizes 1807, before *Mansfield* C. J. it appeared that the Plaintiff's building had anciently been a barn, but had not been used as such for a great many years; that the folding doors of it opened not to the Plaintiff's yard, but to a highway; for many years it had been converted to the purposes of a stable; the last preceding occupier, who was a pork-butcher, had used it as a slaughter-house for slaughtering his hogs, and the present occupier, who was a butcher, used it as a slaughter-house for slaughtering oxen. The yard in question, along which the right of way to these premises was claimed, was a narrow passage, bounded by a row of houses on each side, the doors of which opened into it: when a cart and horse was driven through it, the foot-passengers could not pass the carriage, but were compelled, on account of the narrowness to retreat into the houses; and they would be exposed to considerable danger if they were to meet horned cattle driven through it. It was in

evidence

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evidence that the preceding occupier had been accustomed to drive fat hogs that way to his slaughter-house; and that the Plaintiff had been accustomed to drive a cart, the only carriage which he possessed, usually drawn by a horse, but in one or two instances by an ox, along this passage to his barn, where he kept his cart; there was then no other way to it. He had lately begun to drive fat oxen that way to the premises for the purpose of killing them there; but there was no evidence of any other user than this of the way for cattle. No deed of grant was produced. The Defendant produced no evidence that he had ever interrupted the occupiers of the Plaintiff's premises in driving cattle there, nor that they had been usually possessed of horned cattle which had not been driven that way; he admitted that there was sufficient evidence of a right of way for *all manner of carriages*. It did not appear at what period the houses adjoining the way had been built. *Best* Serjt., for the Plaintiff, contended that a way for all manner of carriages necessarily included a right of way for all manner of cattle; and therefore proved the prescription. *Mansfield* C. J. told the jury, that inasmuch as this was a private, and not a public way, they were not to conclude that a man might not grant a right of way to pass with horses and carts, and yet preclude the grantee from passing with all manner of cattle, and the degree of inconvenience which would attend the larger grant in this case, furnished an argument against the probility of it. He directed them, therefore, to say whether there was sufficienct evidence of a right of way to drive cattle loose, or whether they would consider the grant or prescription as only co-extensive with the use that had been made of it. The jury found a verdict for the Defendant.

Best Serjt. having in *Michaelmas* term last obtained a rule *nisi* for a new trial,

Shepherd

Shepherd Serjt., on a former day in this term, shewed cause. He denied that evidence of a private right of way for carts and horses, was evidence of an unlimited right of way for all sorts of cattle. He distinguished a private from a public way. Where land is dedicated to the public use, unless some restriction is proved, it may perhaps be taken that the way is given for all purposes, and to all places. If a man opens a street, the public may use it as an approach to any other street that lies beyond it. But if a person has a right of way over the land of another to his own close, and purchases the close next beyond his own, he cannot use his way for the purpose of going through his own land to that which he has so purchased. 1 *Rol. Abr.* 391.*Chimin private line* 50. *Laughton* v. *Ward*, 1 *Lutw.* 111. A right of way with a cart and horses is of so different a nature from a right of way for cattle, that in many instances there would be no utility in having the one combined with the other. If a man should convey a coachhouse and stable, a barn in the centre of his own land, or a house at the inner extremity of a long range of buildings, the conveyances would pass a way of necessity, for the coach and horses of the grantee in the one case, in the others, to carry thither his harvest, and his goods, in the usual carriages; because without such a right the thing conveyed could not itself be enjoyed; but no kind of way would pass as a way of necessity, which was not at the time of the grant necessary, by reason of the then subsisting nature of the premises, to the enjoyment of the thing granted, and the way which passed of necessity would not enure to all the purposes to which the buildings might be afterwards converted, even if the purpose could not be deemed a nusance, as this slaughter-house actually was, being situted in the town of *Watford*. Although the Plaintiff, claiming by prescription, does not rest his title upon the present state of the premises, but on what was their original

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ginal state, it rests with him to shew that the premises were originally built for a purpose which required the driving of horned cattle as incident to their convenient occupation; the Court will not presume it without proof, on account of the great inconvenience to lessors and grantors of ways which would result from this presumption. The limitation of the right was properly inferred both from the limited use of the way which the Defendant proved, and from the very circumstance of the houses being there situated, for it could not be supposed that if this easement had existed in the manner contended for, any person would have built a house in a situation subject to so much danger and inconvenience.

Best, *contrà*, admitted with *Rolle*; that a man may specifically limit his grant of way to certain uses only: but no instrument conveying a grant so limited had been produced in evidence in this case. He denied that a way of necessity is restricted to the particular use required by the state in which the property subsists at the time of the grant. No law forbids the purchaser of an estate in fee to alter the state of his property as his profit or convenience may require, and so often as he alters it, his way of necessity shall be adapted to his uses; if he turns his pigstye to a slaughter-house, as he had a way for his pigs, so shall he have a way for his oxen, unless that very use of the property is a nusance; there is no other limitation of his right. The argument from the danger of driving bullocks here is of no weight; for it appears that the driving a cart is equally inconsistent with the use of the way by foot-passengers at the same moment. The general law is, that the grant of a carriage-way comprizes a way for all cattle; it is competent for the Defendant to shew that the general law has been narrowed by compact between the parties, for *conventio vincit legem:* but no such compact is shewn. Lord *Coke* is to be understood

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stood as speaking both of public and private ways, and what he says is equally applicable to both. "*Via* or "*aditus* contains the other two (*iter*, and *actus*,) and "also a cart-way, for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi*, and this is twofold, *viz. via regia*, the king's highway, for all men, and *communis strata*, belonging to a city or town, or between neighbours and neighbours." 1 *Hawk. b.* 1. *c.* 76. *acc.* 3 *Leon.* 13. *Anon. Per Dyer.* "It is good to prescribe *habere viam pro omnibus carriagiis*, generally, without speaking of horse-way, or cart-way, or any other way." In former times, when this building was used as a barn, cattle must necessarily have been driven to the yard this way, to consume the fodder. Antiently too, before the use of carriages was general, all harvests were brought home on the backs of cattle, as still is used in several of the western counties; so that according to the argument used for the Defendant, there must originally have been a way for cattle to the premises.

Cur. adv. vult.

MANSFIELD C. J., having adverted to the facts of the case, observed that in general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but the presumption would be for cattle as well as carriages, otherwise cattle could not be driven from one part of the kingdom to another. The authority cited from *Hawkins* only refers to *Co. Litt.*, and the passage in *Co. Litt.* does not prove that Lord *Coke* was of opinion that in the case of a private way, which must originate in a grant, of which, the grant itself being lost, usage alone indicates the extent, evidence of a limited user could not be received to restrict the usual import of the grant. The general description given by Lord *Coke* does not seem to touch the question. He refers to *Bracton, lib.* 4 *fol.* 232. who

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who only says, "there are *iter*, *actus*, and *via*; but says not a word to explain the meaning of either, or the difference between them. Nor can I find in any of the books, nor even in any *nisi prius* case, any decision that throws light upon the subject. A parson has the *via* or *aditus* over a farm with carts to bring home his tithe, but he can use it for no other purpose. I have always considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved of a cart-way. Consequently, although in certain cases a general way for the carriges may be good evidence, from which a jury may infer a right of this kind, yet it is only evidence; and they are to compare the reasons which they have for forming an opinion on either side. As well at the trial, as since, I have thought that there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle. That would be the case where a person who lived next to a mews in *London*, should let a part of his own stable with a right of carriage-way to it, which could be used with very little, if any inconvenience to himself; yet there it would be a monstrous inference to conclude that if a butcher could establish a slaughter-house at the inner end of the mews without being indictable for a nusance, he might therefore drive horned cattle to it, which would be an intolerable annoyance to the grantor. So cases may exist of a grant of land, where, from the nature of the premises, permission must be given to drive a cart to bring corn or the like, and that right might be exercised without any inconvenience to the grantor; but it does not follow that cattle may be driven there. The inconvenience in this case is a strong argument against the probability of the larger grant. The Defendant was the proprietor of all these houses. My Brother *Chambre* mentioned the case of a public way, restricted to carriages only,

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only, in which some public notice was affixed to caution the public that there was no drift-way, and thought that the absence of such notice in this case was an argument against the probability of the restricted grant. This notice might be requisite in a public way, but in a private way, out of which cattle were excepted, the grantor might reasonable think it unnecessary to give his grantee notice of that, of which he must already be conusant; he might justly suppose that the grantee knowing the nature of his right, would not attempt to use the way otherwise than according to his grant. I can find no case in which it has been decided that a carriage-way, necessarily implies a drift-way, though it appears sometimes to have been taken for granted. I speak with doubt, because my Brother *Chambre* is of a different opinion, but I incline to hold that the verdict ought not to be disturbed.

HEATH J. This is a prescription for a way for cattle and a carriage-way is proved. A carriage-way will comprehend a horse-way, but not a drift-way. All prescriptions are *stricti juris*. Some prescriptions are for a way to market, others for a way to church, and in the ancient entries, both in *Rastal* and *Clift* the pleadings are very particular in stating their claims. In *Rastal*, tit. *Quod permittat*, the distinction is clearly seen. Sometimes there is a carriage-way qualified. One claim is remarkable, *fugare quadraginta averia*. The usage then in this case, is evidence of a very different grant from that which is claimed, namely, to drive fat oxen; animals dangerous in their nature, and which there might be very good reason to except out of a grant of a way through a closely inhabited neighbourhood. The jury having heard the evidence, and formed their opinion upon it, I am not prepared to say that the verdict shall not stand.

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LAWRENCE J. I should have been as well satisfied if the verdict had been the other way, but as the jury have decided upon the evidence, I am unwilling to disturb their verdict. This is the case of a prescriptive private way, which presumes a grant: the question then is, What was the grant in this case? That is to be collected from the use; for it is to be presumed that the use has been according to the grant. A grant of a carriage-way has not always been taken to include a drift-way. In the entries are cases of prescription, not for carriages only, but for cattle also. *Co. Ent.* 5 6. *Quod permittat ad carriandum et recarriandum blada, fœnum, et fimum, ac omnia alia necessaria sua, cum carris et carectis suis, et ad fugandum omnia et omnimoda averia sua.* The person who drew that entry certainly did not conclude that a carriage-way included a drift-way for cattle. The use proved here, is of a carriage-way: the grant is not shewn, and the extent of it can only be known from the use. If the use had been confined to a carriage-way, I should have had no difficulty whatever in saying that it afforded no evidence of a way for horned cattle; for till they were driven there, no opposition could be made, nor the limitation of the right shewn; but pigs have been driven that way, and stress is laid upon this circumstance. That then may be good proof of a right to drive pigs that way, but the user of the way for pigs is not proof of a right of way for oxen. The grantor might well consider what animals it was proper to admit, and what not. The place is very narrow, and full of inhabitants. There is no danger from pigs, and carriages always have some one to conduct them. Cattle may do harm, and passengers cannot always get out of their way, but if the cattle are driven forward, serious injury may be done. The nature of the place, therefore, may probably have suggested a limitation of the grant.

CHAMBRE

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CHAMBRE J. I think there ought to be a new trial; for all the evidence was on one side, and the verdict went against the evidence. I never thought that a carriage-way necessarily included a drift-way; but I think it is *primâ facie* evidence, and strong presumptive evidence, of the grant of a drift-way. Undoubtedly a person may restrict his grant as he pleases, and when he has so limited it, the pleadings must be adapted to the particular grant; which accounts for the variety in the entries. But it rests with the grantor to prove the restriction of the grant; otherwise it must be intended to be of the usual extent. This inconvenience indeed may occur from such a determination, that if the evidence be lost, the grantor may lose the benefit of his restriction, but he may, and ought to preserve the evidence of the restriction; and the inconvenience would be of small extent; for I believe the cases are very few where a carriage-way has not been accompained with this right; there seems to be almost a necessity for including it. The grantee may send back his horses without his carriage. He may draw his carriage with oxen; and the oxen, as well as the horses, must be driven back loose to pasture. There is strong presumptive evidence then of a drift way. If the burthen of the proof lies on the tertenant, it certainly is possible that he may lose the right of restraining the way; but for one case where the evidence has been lost, and would be supplied by this decision, there will be a thousand cases where a restriction will be created that did not exist in the original grant. I fear these rights of way will be very much narrowed, if they are to be confined to such actual use of them as can be proved. The manner of using a way may vary from time to time. I think the proof of driving hogs is an important circumstance, and very strong evidence of a grant of way for cattle. According to the

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doctrine contended for, it would be necessary to drive every species of cattle in order to preserve the right of passing with that species. If a man had a little field where cows had not usually been pastured, it would be monstrous that he therefore should not drive his cow to it. Suppose any new species of cattle is introduced into the country, shall the grantees of private ways have no passage for them to their lands. Is it to be contended, for instance, that no ancient private way in the kingdom can be used for *Spanish* sheep? Much of the argument has been built upon these being horned cattle. Many breeds of kine have no horns, may the grantee drive those? As to the argument that the inconvenience of such an use amounts to a nusance, nothing of that sort appears. The grantee has constantly driven all the carriages, and all the cattle that he had. This is a claim by prescription, which imports great antiquity, and it does not appear how wide the way was at the time of the original grant, and how much the houses have encroached on it long since, but those encroachments cannot deprive the grantee of his antient right of way.

Rule discharged.

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If a mixed fund, consisting of real and personal property, be made subject to appointment, it is not necessary that each of the objects of the appointment should have a part of each kind.

Devise to the testator's wife, remainder to her children, subject to appointment. A child born after making the will, in the testator's lifetime, is an object of the appointment.

If one, having only an estate for life with a power to appoint in fee, devise the property as her own, it shall be held a good exercise of the power.

Secus, if she had an interest in the reversion as well as a power.

No appointment is held illusory in a Court of law.

Devise to *A.* for life, remainder to testator's children as *B.* shall appoint. The fee simple becomes vested on the testator's death in all his children then living, subject to be devested by the appointment.

A general residuary clause will carry estates not in the contemplation of the testator, unless the will contains special indications of a contrary intention.

THIS was an ejectment, brought to recover certain premises in the parish of *Upton Snodsbury*, which the lessor of the Plaintiff claimed as heir at law to *John Surman*, his father. Upon the trial of this cause, before *Graham* B. at the *Worcester* Summer Assizes 1807, a verdict was found for the Plaintiff, subject to the opinion of the Court upon a case, the material facts of which were as follow: *John Surman* being seized in fee of the premises, made his will, duly executed and attested to pass real estates, in which, "*as to his worldly estate*, he gave and disposed thereof as follows. All that his messuage or malthouse and garden in the parish of *Upton Snodsbury*, likewise all that house, with the garden and orchard thereto adjoining, known by the name of the *Red Lion*, in the parish aforesaid, he gave to his wife *Eleanor Surman* for her natural life. All the residue of his real and personal estate whatsoever, whereof he had not by that his will disposed, all his goods and chattels, stock in trade, bills, bonds, and all other securities for money whatsoever, he gave unto his wife *Eleanor Surman*, for her to receive the rents and profits thereof to her own use, and to maintain her children, during her natural life, she paying thereout his just debts and funeral expences, and the charge of proving that his will. And

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after her decease, then he gave and bequeathed the *same* unto his children, to be parted among them as she should think proper. All his personal estates, goods, and chattels at her disposal. And he thereby constituted his wife sole executrix." The testator died seised, without altering his will, leaving his wife *Eleanor*, and six children, *viz.* the lessor of the Plaintiff his eldest son and heir at law, *John*, *Mary*, *William*, and the Defendants *James* and *Francis*, him surviving. *Francis* was born after the will was made, but before the father's decease. *Eleanor*, his widow, afterwards made her will, duly executed and attested to pass real estates, and thereby "devised and bequeathed unto her two youngest sons, *James* and *Francis*, all that her freehold messuage, tenements, and premises in which she then lived, together with the malthouse, all which premises were then in her occupation, and known by the sign of the *Red Lion* at *Upton Snodsbury*: she also gave and bequeathed unto her said two sons, *James* and *Francis*, all her household goods, stock in trade, and all personal property that she should die possessed of, whatsoever and wheresoever the same should be at the time of her decease, to hold as joint-tenants until *Francis* should attain the age of twenty-one years: then she willed and directed that the whole of her real and personal estate should be equally divided between her said two sons *James* and *Francis*, share and share alike, subject nevertheless to the payment of her debts, and the several legacies thereinafter by her bequeathed to her other children. And after reciting that her son *Thomas Surman* being settled in business during the life of his late father, he had his share of their property already, she therefore gave him one guinea only; she gave to her son *John* the sum of 5*l.*, to her son *William* 8*l.*, and to her daughter *Mary*, the wife of *Joseph Cowell*, 14*l.*; which legacies made their shares as nearly equal as she could

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could guess, with what their brother *Thomas* had had, and to be paid to them when her son *Francis* arrived at the age of twenty-one years. And having expressed some further limitations of the real estate in case either of her sons *James* or *Francis* should happen to die during the minority of *Francis*, leaving no lawful issue, she thereby constituted her sons *James* and *Francis* her executors." The lessor of the Plaintiff, *Thomas Surman*, had been settled in the business of a miller by his father in his life-time. The testatrix *Eleanor Surman* died, leaving the said six children her surviving: upon her death, the Defendants entered on the premises, and were possessed thereof at the time of the trial.

This case was argued in *Hilary* term last by

Williams Serjt. for the Plaintiff, who contended, first, that the testator, *John Surman*, had devised no greater estate in the premises than to his wife for life, and that the reversion, therefore, descended to the heir at law. The heir is always peculiarly favoured in courts of justice, and is not to be disinherited by ambiguous words. It is true that the words of the residuary clause are sufficiently large; and doubtless general words will often carry a remote reversion which was not in the contemplation of the testator, as in the cases of *Hogan* v. *Jackson*, *Cowp.* 307. and *Goodright, on the Demise of the Marquis of Buckinghamshire*, v. *The Marquis of Downshire*, 2 *Bos. & Pull*, 600. But that effect is controuled here, by the manifest absurdities which would ensue from such a construction. The testator, in his residuary clause, speaks of his real estate whereof he had not by that his will disposed; but he had just before disposed of an estate for life in these very premises; and he cannot be intended to devise a further interest in them, without wholly rejecting those words: whereas all the words of a will must have some effect given to them if possible. He

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proceeds to give to his wife for her life the rents and profits of the subject of this second devise; but it is impossible that he could mean to give to his wife for her life the rents of that reversionary estate which was to come into possession only upon her own decease: it was equally impossible that she could out of those rents, maintain, as she was directed, her children during her life, and discharge the testator's testamentary expences, which was a payment to be made immediately upon his decease. The decision in the case of *Strong* v. *Teate*, 2 *Burr.* 912. proceeded on this ground. So *Roe d. James* v. *Avis*, 4 *Term Rep.* 605. *Goodtitle d. Daniel* v. *Miles*, 6 *East*, 494. the testator having, under his marriage-settlement, an estate for life, with a reversion to himself in fee, subject to the estate-tail of his daughters, devised to his daughter *Judith* and the heirs of her body, all his freehold and leasehold lands *which were not settled in jointure on his late wife*, and it was held that the reversion in fee did not pass by that devise, on account of the absurdity of supposing that he had devised an estate-tail to a person who had already the same estate in the same premises. In that case Lord *Ellenborough* C. J. recognized the case of *Chester* v. *Chester*, 3 *P. Wms.* 56. [*Mansfield* C. J. That case was decided on the authority of *Strode* v. *Lady Russell*, 2 *Vern.* 621. It is a shocking decision, but it has been followed by a hundred others.] And his Lordship observed that the effect of a residuary clause in a will, although sufficiently comprehensive, may be controuled by the general intent. Here the testator had already disposed of the premises in question, before he made the second devise. And if the reversion does not by these words pass to the wife, it cannot go to the children. The devise is, "from and after her decease, I bequeath the *same*," which means "the residue whereof I have not in this my will disposed of;" it cannot mean the whole given in my will, every thing

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thing that is already disposed of. But if this clause included the reversion, still the will of the wife is a bad execution of the power given her by the testator, of making partition among his children, and the estate either descends to the heir at law, subject to a trust to be divided by him equally among the children, or descends to the testator's six children equally, of whom the heir is one. *Cunningham* v. *Moody*, 2 *Ves*. 174. *Doe on the Demise of Willis* v. *Martin*, 4 *Term Rep*. 39. The latter is a very remarkable case. There the estate was limited to the wife for life, remainder to the husband for life, remainder to the use of all the children, or such of them, and in such proportions as the parents should appoint, and for want of such appointment, to the use of all the children in fee, and in default of such issue, to the father in fee; with a power to the parents to revoke the uses, and sell the estate, upon condition of repurchasing other lands. The parents, after the birth of some children, revoked the uses, and appointed new uses to a stranger, and the question was, whether the children had only a contingent remainder, which this act might destroy; or whether they had a vested estate; and, if so, whether this should devest their estate. The Court, on the authority of Lord *Hardwicke's* decision in *Cunningham* v. *Moody*, held, that the children upon their birth took an estate in fee, subject to be devested by a due appointment. But in the present case, it seems rather that the estate descended to the heir at law, until appointment executed. The objections to the appointment are, that the testatrix does not even profess to execute the power: she expressly gives the property as her own. The power in this case purports that both the real and personal estate are to be parted among the testator's children, which must be among all the children; and the widow devises to her two youngest children only the whole real estate, and the whole personal estate, except certain small

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small legacies, and does not give to each, a part of the real, and a part of the personal estate. *Mengey* v. *Walker. Cas. temp. Talb.* 72. Again, *Francis* was not born at the time of making this will; he was not, therefore, originally one of the objects of the testator's bounty, and the power cannot be extended in favour of any others. Lord *Loughborough*, Chancellor, said in one case, "if the word were *issue*, I could extend it *ad infinitum*, but I cannot under the word *children* include grandchildren. We must act according to the extent of the instrument giving the power."

Bayley Serjt. *contrà*, contended, that according to the cases of *Tomlinson* v. *Dighton*, 1 *P. Wms.* 149. and *Liefe* v. *Saltingstone*, 1 *Mod.* 189. the reversion became subject to the wife's appointment. He admitted that to make the appointment good, each child must take a share, but contended that it was not necessary that each should take a share of each component part of a mixed fund; an appointment of a share of either to each was good. The sufficiency of the amount of the share could not be questioned here. *Spring* v. *Biles*, cited 1 *Term Rep.* 438. *n.* *Kempe* v. *Kempe*, 5 *Ves.* 861. *Vanderzee* v. *Acom*, 4 *Ves.* 784. But supposing that the appointment were bad in law still the Plaintiff's lessor would be entitled to one-sixth only of the estate. *Kempe* v. *Kempe*, 5 *Ves.* 859.* For it was a vested interest in the children, according to the cases of *Doe d. Willis* v. *Martin*, and *Cunningham* v. *Moody*. Indeed it would appear absurd to hold that an appointment of the whole in favour of one must necessarily be bad, but that the same estate, without any appointment, should all go to one. It was clear that the after born child might take. *Wilde's* case, 6 *Co.* 17. *b.* *Bateman* v. *Roach*, 9 *Mod.* 104. *Baldwin* v. *Karver*, *Cowp.* 309.

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Williams, in reply, cited the argument of Mr. *Scott*, now Lord Chancellor, in *Ackroyd* v. *Smithson*, 1 *Bro. Cha. Cas.* 506. in behalf of the right of the heir, that this was not a vested interest in the children. He referred also to *Purefoy* v. *Rogers*, 2 *Saund.* 380.

Cur. adv. vult.

The Court now delivered their opinions *seriatim*

CHAMBRE J., after having recapitulated the material parts of these two wills, observed, that the claim of the lessor of the Plaintiff was founded on the idea, either that the real estate was not at all devised by the will of *John Surman*, or that if it was devised, the disposition made by his widow was not a good appointment under her husband's will. The cases of *Goodtitle* v. *Miles*, *Strong* v. *Teate*, and *Doe on the Demise of Davis* v. *Saunders*, 2 *Cowp.* 420. which had been cited in support of the first position, seemed to prove exactly the contrary; for those were all cases in which there was a special indication of an opposite intention, which controlled the effect of the general words; but where no such indication was to be found, the words here used were sufficient to carry the reversion. The first question here then, was, what was the effect of the will of *John Surman*? It was a very singular will, and he was glad that the opinion of his Lordship and his brethren upon it differed from his own. These two youngest sons had not been advanced in life: and the widow very rationally gave them that, which put all the children upon an equality. An interest in the personal as well as in the real estate, was certainly given to the children, by the clause in which the testator bequeathed the *same* after his wife's decease, to his said children, to be parted between them, as she should think proper. But the word *same* was so explained afterwards, that it must be confined to the real estates;

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estates; and if so, the widow's appointment, being for the benefit of two only of the children, must be bad. Illusory appointments were not known at law, but something must be given to each under this power. The testator afterwards made his wife executrix, and gave all his personal estate, goods, and chattels, to be at her disposal. On the principal that no words were to be rejected, which could possibly be retained, he thought that this was a revocation of the former residuary bequest of his personal estate to his children, and left the real estate, as the only subject of the division directed by the testator. It was further to be observed, that if the widow was to be accountable for every article that came to her hands, that would have rendered it impossible for her to carry on the testator's trade of a publican. Consequently the appointment was bad; and if bad, the estate must go in equal shares to the six children. One of them was born after the making of the will; but it was before the decease of the testator, and the case of *Baldwin* v. *Karver*, and other cases, had decided that this circumstance did not prevent a devise from extending to all the children, and that the child born after the making of the will in the testator's lifetime must be admitted to partake.

Heath J. differed from his brother *Chambre* in his construction of this obscure will. It appeared that the testator was possessed of this house where his business was carried on, and of some personal property. His first object was to secure to his children his personal property. It was a prudent precaution to give it to them in such shares as his wife might direct. A second husband might have dissipated it. This then was a mixed fund for distribution, consisting of real and personal estate. The appointment was executed in the most prudent way imaginable. The first question was, whether the personal

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sonal estate was destined for the chidren; if it was not, the Court unanimously agreed that the power was ill executed. If it was, the next question occurred, whether the power was satisfied by giving real estate to one child, and personal estate to another? The word *same*, since there was a joint fund, must relate to the whole fund. The doubt was, whether the words which made the widow executrix, repealed the former words. They were in the same period; and it was a rule of construction, that if the whole of a sentence could be made to stand together, it should be so construed. *Chambre* J. proposed to controul the word *same* by the subsequent words, he controuled the subsequent words by the word *same*.

MANSFIELD C. J. thought that the testator's intention, though difficult to discover, was to make his wife tenant for life, and then to divide his property among his children, as she should think proper. He made his wife executrix, and gave her all his *stock in trade*, bills, bonds, &c. she paying thereout all his just debts. It was impossible to apply the word *same* to one sort of property and not to the other; from and after her decease, he gave the *same* to be divided among his children, as she should think proper. It seemed the most rational construction, to say the testator meant that she should take the whole for her life only: from the bequest of the stock in trade, it appeared probable, that the testator thought his wife would continue his trade; and the words "all my personal estate, goods, and chattels, at her disposal," appeared to mean, that she should have a discretionary power to sell, change, or enlarge the stock as she should find expedient. The next question was, whether there was a good appointment, to prevent the eldest son from claiming a share in opposition to the will of his mother. The question was a new one in its present

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sent form, but he inclined to think that the appointment was a good one, so far as he could collect from the adjudged cases. The cases on appointments were numerous, but none of them turned upon the point of a vested interest; they all proceeded on the question of an illusory share. But the doctrine of illusory appointments could not be discussed there. If, according to the terms of the power, some share were given to each, it was impossible for a court of law to say how much each should have: that must depend upon the appointment itself. If an hundred thousand pounds were the fund, and five shillings were the sum given to one, the appointment would be good at law. But in the present case there was a fund consisting both of real and personal estate, and to several of the children no part of the real estate was distributed. The question then arose, whether it was necessary to give a part of the property of each description to each of the objects of the testator's bounty. If the Court of Chancery had to decide whether such an appointment were illusory or not, in a case where it was the more convenient course to give a part or the whole of the realty to one child, and a part or the whole of the personalty to another, it cannot be conceived that the Court would deem it illusory, because a part of each species was not given to all. And if this were so in equity, at law, could there exist a doubt that the giving part of one species only would be a good legal appointment? If so, the lessor of the Plaintiff was entitled to no part of the real estate. But it had been said, that this was not a good execution of the power, because the testatrix disposed of the property as her own. It is true that where a person having an interest and a power, does not refer to the power, it shall be held that he means only to dispose of his interest. *Cleer's* case, 6 *Co.* 17. 3 *res.* But where *A.* is seised of an estate with a power for *B.* to appoint; there *B.*, having no estate, his act shall

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shall necessarily be inferred to be done in execution of the power. In a case where a woman devised her real estate, having none, but a power to appoint a real estate of her husband's, Lord *Loughborough*, Chancellor, held it was a good execution of her power. The testatrix, then, taking as she did, only a life interest in the real estate, certainly had only a power over the reversion, and not an interest in it. And therefore although she uses terms of devise, it is plain that she meant to execute the power. Two other points had been raised, whether the eldest son, or all the children, or all but one, should have taken the real estate, in case the appointment had been bad. He thought all the children, including the after-born child, would have taken: but it was not necessary to decide the two last points, as he was of opinion with *Heath* J. that the lessor of the Plaintiff was not entitled to recover any thing.

LAWRENCE J., not having been on the bench when the case was argued, expressed no opinion.

Postea to the Defendants.

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If a ship freighted to H. is prevented by restraints of princes from arriving, and the consignees direct the master to deliver the cargo at G. and accept it there, he may maintain *assumpsit* upon an implied contract to pay freight *pro ratâ itineris*.

And if the master be prevented by the default of the consignees or restraints of princes from delivering the whole cargo there, he shall be entitled to freight *pro ratâ* for the part delivered.

If a ship be freighted on a single voyage outwards, and be prevented from delivering her cargo, *semble* that she shall be entitled to receive from the owner of the cargo, freight for bringing it back.

And demurrage from the time of her arrival at the port of loading and notice, till the owner receives the cargo, or the master has had time to discharge it, if abandoned by the owner.

And that the master would not be entitled, upon losing the delivery, to cast away the residue of the cargo.

If the master signs a bill of lading, expressing that upon delivery of the cargo freight is to be paid by the consignees, he does not thereby renounce his claim for freight against the consignor.

Semble, that the master's right to exact payment of any part of the freight from the consignee, does not arise till the delivery is completed, or determined.

Upon an agreement to pay certain pilotage and port charges for an entire voyage, though a part only of the cargo is delivered, there shall be no apportionment of the pilotage and port charges, but the whole shall be paid.

THIS was an action brought to recover freight, demurrage, and port-charges, upon a voyage intended to have been made to *Hamburgh*. The first count of the declaration set forth a charter-party in writing, not sealed, whereby the Plaintiff, being owner and master of the *True Briton*, on the 2d of *October* 1806 agreed to let her to freight for one voyage from *Shields* to *Hamburgh*, and stipulated that the ship should be kept tight, &c. during the voyage, with an exception of perils of the seas, restraints of princes and rulers, fire, and enemies; the Plaintiff agreed to take on board a full cargo of coals on account of the freighter or his assigns, and to proceed for *Hamburgh*, and on his arrival to deliver the same to the freighter or his assigns at such convenient place or places where the ship and cargo might safely come; that the ship should for her loading lie until the 9th of *October*, and for her delivery lie at the rate of one working day *per* keel, and so to end the voyage. In consideration

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ration whereof the freighter agreed not only to put on board a cargo of coals, and to receive or cause the same to be received from on board her at *Hamburgh* within the times limited for her loading and delivery, but also to pay the Plaintiff in full for the freight of the ship for the voyage, after the rate of 20*l.* *per* keel, on the delivery of the cargo, by the master having what money he might require for the ship's use, and the remainder by a good bill on *London* at two months' date, with 5*l.* demurrage for every day of the ship's detention beyond the days so limited for her loading and delivery; and also two full third parts of all pilotage and port-charges which might be incurred during the voyage. The declaration further averred that on the 13th of *October*, and not before, through the default of the Defendant in not loading the ship within the stipulated period, although the Plaintiff was ready within that period, he received on board a full cargo, to wit, 17 keels of coals, on account of the Defendant or his assigns, and proceeded towards *Hamburgh*, and on the 8th of *November* arrived at *Cuxhaven*, being a port in the course of the voyage from *Shields* to *Hamburgh*, and gave notice thereof to the agents or assigns of the Defendant at *Hamburgh*; and on the 12th of *November* arrived at *Gluckstadt*, another port in the course of the voyage, he having been forced and compelled by certain officers acting in the service of the king, and whose orders he could not resist or controul, to remain at *Cuxhaven* until that day. The Plaintiff further averred that by the restraint of princes, and by reason of the danger of capture, to which the ship and cargo would be exposed by reason of certain enemies of his majesty being then near to, and likely to seize and occupy *Hamburgh*, he was prevented from proceding nearer to *Hamburgh*, whereof the Defendant had notice; and that in consideration of the premises, and that the Plaintiff, at the Defendant's request, would deliver the cargo at *Gluck-*

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stadt to the Defendant or his assigns, into such craft or lighters as he or his agents or assigns should send, the Defendant undertook to pay freight for the cargo from *Shields* to *Gluckstadt*, and the same demurrage, and after the same rate as was stipulated in the charter-party, together with two third parts of all pilotage and port-charges. The Plaintiff then averred that he did deliver at *Gluckstadt*, to certain assigns or agents of the Defendant, into certain craft or lighters sent by them, 7 keels and 1 chaldron of coals, part of the cargo, and was ready and willing to have delivered the residue, in the like or in any other manner, which the Defendant, his agents, or assigns, should direct, and for that purpose remained at *Gluckstadt* until the 21st of *November*, whereof the Defendant and his assigns had notice, but that they did not receive it; that he was on that day directed by certain officers in his majesty's service, having authority, (and which directions were occasioned by certain acts of his majesty's enemies, and it being in consequence of such acts unsafe and exposing the ship and cargo to risk of capture to remain at *Gluckstadt*), to proceed from *Gluckstadt* back to *Cuxhaven*; that he accordingly returned to *Cuxhaven*, and remained there until the 25th of *November*, with the will and intent to have delivered the residue of the cargo, but that the Defendant and his assigns neither sent any craft or in any manner received the residue of the cargo. The Plaintiff further averred that he was on that day compelled, by and in consequence of the restraints of princes and rulers, the acts of the enemy, and by certain officers acting under the orders of his majesty ordered, to sail from *Cuxhaven* for this kingdom; that on the 1st of *December* he arrived at *Shields*, and on the 4th of *February* 1807 in this kingdom, to wit, at *London*, &c. he landed and delivered the residue of the cargo, which he was so prevented and hindred from delivering at *Gluckstadt* or *Cuxhaven*, or

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elsewhere, but which might have been delivered or received had the Defendant loaded the ship within the time stipulated, as he might and ought to have done; or had he, his agents or assigns, used due diligence. The Plaintiff then claimed for 71 days' demurrage, at the rate in the memorandum specified, 355*l.*; for the freight of the cargo 340*l.*; and for two third full parts of the pilotage and port-charges 25*l.* 14*s.* 6*d.* The second count stated that the residue of the cargo had, since the ship's return, with the Defendant's knowledge and assent, been landed in this kingdom. The third count stated a substituted contract entered into by the Defendant, to pay *reasonable freight* for the cargo, *or so much thereof as should be delivered,* and averred that the Plaintiff, after being compelled to return, discharged and delivered the rest of the cargo for the use of the Defendant, with notice, and claimed 142*l.* 10*s.* only for freight of the 7 keels 1 chaldron. Upon the trial of this cause at *Guildhall*, at the Sittings after *Michealmas* term 1807, before *Mansfield* C. J., the Plaintiff proved the charter-party as stated. He also proved that Defendant did not fully load the vessel till the 13th of *October*, being four days after the time stipulated for completing the cargo, in consequence of which the Plaintiff claimed 4 days' demurrage, and the Defendant paid him 10*l.* in part, and indorsed on the charter-party a memorandum that "if the ship should lose the then convoy "about to sail from *Leith* or *Hull*, in that case the captain was to be paid 10*l.* for 2 days' demurrage, at "5*l.* *per* day, which Messrs. *Ross* and *Schleiden*, (the "Defendant's consignees) were desired to have the "goodness to pay to Captain *Christy.*" The Plaintiff lost that convoy. He sailed, and on the 8th of *November* arrived off *Cuxhaven*, which is so near to *Hamburgh*, that he could with ease have reached that place on the same day; but being prohibited by the commander of

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his majesty's naval force there from proceeding, because the *French* forces were then nearly approaching to *Hamburgh*, he sent thither intelligence of his arrival to *Ross* and *Schleiden*, who in answer directed him, "if he "should, against expectation, have waited that answer "to his welcome letter, to sail as far as *Gluckstadt*, "where they would send him some lighters." The Plaintiff arrived at *Gluckstadt* on the 12th of *November*, and on the 15th and 16th, in pursuance of written orders received from *Ross* and *Schleiden*, delivered 7 keels and 1 chaldron of coals into the only lighters sent by them. If sufficient lighters had been sent, the whole cargo might have been discharged during the ship's stay at *Gluckstadt*. She was, however, enabled to discharge at the rate of a keel *per* working day during her stay there. On the 21st the *French* having entered *Hamburgh*, the Plaintiff, by direction of the *British* consul, and of the commanders of his majesty's ships, returned to *Cuxhaven*; and on the 23d received from them instructions to return to *England* with the rest of the cargo, in consequence of which he sailed on the 26th, 15 working days only having elapsed since his first arrival in *Cuxhaven* roads, and reached *Shields* on the 1st of *December*; on the 9th he apprised the Defendant of the circumstances, and inquired how he was to dispose of the cargo; to which the Defendant, on the 10th replied, that the Plaintiff was at liberty to proceed in any way he thought proper, as his contract with him (the Defendant) had not been performed. The Plaintiff having, on the 14th, given him notice of his intention to land the cargo at the Defendant's risk and expence, unless he should, himself unload it within 7 days, on the 4th of *February* finished the landing of it on a public wharf at *Shields*, and apprized the Defendant of what he had done. The Plaintiff had paid 32*l*. 12*s* 5*d*. for the whole of the pilotage and port-charges, but the reasonableness of some of

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of the charges was contested. The Defendant proved the bill of lading, by which the Plaintiff agreed to deliver the cargo at the port of *Hamburgh* to Messrs. *Ross* and *Schleiden*, merchants there, or to their assigns, he or they paying freight for the same. This was signed by the captain, "*as per agreement to charter. J. Christy.*" The Plaintiff contended he was entitled to recover the whole freight for 17 keels and 57 days demurrage, viz. 2 days before the vessel sailed, and 55 days after her return, viz. from the 9th of *Dec.* to the 4th of *Feb.* *Mansfield* C. J. directed the jury that the Plaintiff could be entitled to freight only *pro ratâ* for the quantity of coals delivered; that he was entitled to demurrage after his return, not for the whole time he kept the cargo on board, but for a reasonable time, until he could have found a proper place to discharge it; for that, upon the Defendant's disclaimer, the Plaintiff might have thrown the coals overboard; he left it to the jury to consider whether there was sufficient evidence of the agency of the consignees, to authorize the Plaintiff in obeying their instructions for altering the ship's destination; and he reserved to each party the several points which were afterwards discussed. The jury found a verdict for the Plaintiff; in calculating the damages, they awarded him,

1. Freight for 7 keels of coals, at 20*l.* *per* keel - -	£140	0	0
2. Compensation for the use of the ship at *Shields* upon her return, for 14 days, until the Plaintiff could have gotten a place to receive the coals, at 5*l.* *per* day - - -	70	0	0
3. For the 2 day's demurrage incurred before the ship's departure - -	10	0	0
4. For two third parts of the entire pilotage and port-charges - -	20	0	0
Making the whole amount of the damages	£240	0	0

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Shepherd Serjt. in *Hilary* term last obtained a rule *nisi* that the verdict might be increased to 440*l*. upon the ground that the Plaintiff was entitled to freight, at 20*l*. *per* keel, for the entire cargo; and *Bayley* Serjt. obtained a rule *nisi*, that the verdict might be set aside, and a nonsuit entered, or that each of the several constituent sums might be deducted from the amount of the damages.

In *Easter* term last *Shepherd* and *Lens* Serjts. first shew-cause against the rule obtained by the Defendant, and at the same time endeavoured to support the Plaintiff's rule. They observed that the objections made to the Plaintiff's claim for the freight were, 1. That the cargo was not delivered at *Hamburgh*, but elsewhere. 2. That no part of the freight was due, because the whole of the cargo was not delivered. 3. That it was not proved that the Defendant had authorized *Ross* and *Schleiden* to substitute *Gluckstadt* as a port of delivery instead of *Hamburgh*.—1. The Plaintiff is not under the necessity of contending that he has earned freight, specifically so called. He founds his action upon the supposition that inevitable accident having prevented the performance of the first contract, he is entitled, upon an express or implied contract, substituted for the other, to recover a reasonable compensation for the use of his ship, and he refers to the original charter-party, only to shew that 20*l*. *per* keel is, by agreement between the parties, a reasonable rate of payment. In the case of *Cooke* and *Jennings*, 7 *Term Rep*. 382. it was rightly decided, that the Plaintiff, having declared upon the original contract, the performance of which had been defeated, could not recover: and the present action was framed upon the opinion which the Court then gave. Supposing that the whole 17 keels had been delivered at *Gluckstadt* by the Defendant's order, the delivery at *Gluckstadt* is to all intents equivalent to a delivery at *Hamburgh*. *Cooke* v.

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Jennings is the only case where, the goods having been accepted by the freighter, the captain has not been held entitled to recover freight *pro ratâ itineris;* but even this case cannot be deemed an authority to support that position. 2. If it were a necessary precedent condition, that the whole of a cargo should be delivered, before any part of the freight became due, there is scarcely any voyage upon which freight can be recovered. For whenever a part of the cargo in a chartered ship, or a piece of goods in a general ship, is thrown overboard in a tempest, or whenever a single handful of any article is wasted or lost on the voyage, the owner must have a right to take the residue of his cargo without paying any freight at all. The case of *Bright* v. *Cowper*, 1 *Brownl.* 21. cited by *Grose J.* in *Cooke* v. *Jennings*, is not in point against the Plaintiff; by the question, which is there stated to be, " whether the merchant should pay *the money agreed for,* " and by the reason assigned for the judgment, which is, that " the captain had not *performed his contract,*" it appears, that the Plaintiff there claimed the whole freight, though all the merchandize had not been delivered. It would be no forced construction to raise, under the circumstances of the present case, an implied promise to pay *pro ratâ* for the part delivered: that however, is not necessary, for by the terms of the charter-party, the Plaintiff was to receive freight in proportion to the quantity which he should deliver. 3. When a merchant consigns goods to himself or his assigns at a foreign port, it is to be inferred that he has agents there, authorized to do every thing necessary for the fit disposition of the cargo. The Defendant gives an order on *Ross* and *Schleiden* for 10*l.* he agrees that the Plaintiff shall receive at *Hamburgh* such money as shall be wanted for the use of the ship, and the residue of the freight by a bill. Of whom is the Plaintiff to receive the sum of 10*l.* the other money, or the bill, but from the Defendant's agent?

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agent? It is to be presumed then that his assigns are his agents for these purposes. With respect to increasing the verdict, they admitted that they had found no case in which freight outwards had been recovered, the voyage having been defeated and the cargo brought back. But a *French* ordinance enacts, that " if it happen that commerce be prohibited with the country to which a ship is in the course of sailing, and the ship be obliged to return with its lading, there shall be due only the freight outwards, although the ship be hired out and home." *French Ordinances, Liv.* 3. *tit.* 3. *Fret. art.* 15. *Valin, tom.* 1. 657. *Pothier, Ch. Parties, No.* 69. It seems that this ordinance is restrictive of the master's general right, and that but for this he would be entitled, in such a case, to freight both outwards and homewards. But if the Plaintiff is not entitled to recover the outward freight, he is nevertheless entitled to freight homewards, for having brought the goods back. If the master, having done all in his power to effect the voyage, upon the delivery being frustrated, in the exercise of his best judgment for the benefit of the owner, brings back the goods, the owner must not enjoy his option to receive or reject them, without paying the master an equivalent for his labour, wages, and expences; the measure of that equivalent is ascertained, by the agreement for the freight outwards. If the owner may refuse payment, there is no mutuality; for it is clear that although the Plaintiff was prevented from delivering more of the coals, he would not therefore have been justified in immediately throwing the residue overboard; but if he had so done, he would have been liable to an action. The value of the goods is immaterial. If the master might cast away coals, he might in the like circumstances equally cast away cochineal, or diamonds. He could not foresee that the Defendant would elect to abandon the goods: if before his return he could have received the Defendant's

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ant's refusal to freight them home, perhaps he might have had a larger option how to act. But in this case, until the Defendant had altogether renounced the cargo, the Plaintiff would not have been justified in putting the coals out of his vessel. 2. This reason is equally forcible to entitle the Plaintiff to the demurrage due after the vessel's return: the jury have properly ascertained by their verdict the time which he reasonably ought to have waited before he could dispose of the coals without directions from the owner. 3. An agreement to pay demurrage due before the voyage, must be fulfilled, whether or not the voyage is afterwards performed, and freight earned. The indorsement is neither a bill of exchange upon the consignees, nor has the Plaintiff accepted in satisfaction a mere recommendation to them to pay that sum if they should think it fit. The Plaintiff had not the power to inforce this payment from the consignees by detaining the cargo. If the captain should refuse to deliver goods, consigned in the usual form, the consignees paying freight, otherwise than on payment of demurrage, it is clear that, upon tender of the freight only, the consignee might recover for them in trover. 4. The ship having arrived at her substituted port of destination, is meritorious to the full extent of the pilotage and port-charges agreed for, without the payment of which, she could not have arrived there, nor could the consignee have had any benefit whatever from the voyage. Consequently, the proportion agreed to be paid in respect of the whole cargo, cannot be subjected to any further apportionment.

Heywood Serjt. *contrà*. Though the exception of restraints of princes, introduced into the charter-party, protects the Plaintiff against a action for the non-performance of the voyage, it does not enable him to recover the recompence to which he would have been entitled

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entitled if he had performed it. The circumstances in the case of *Cooke* v. *Jennings* were precisely similar; yet there, in giving judgment, Lord *Kenyon* C. J. asked, inasmuch as the ship never arrived, from what period the stipulated bills at 4 months were to be dated; and observed that the case of *Luke* v. *Lyde*, 2 *Burr*. 882., in which an implied contract was raised on the general marine law, materially differed from a demand resulting from an express contract. The same observations apply to the present question, and here this further distinction subsists, that the whole freight, though it was to be ascertained by the measure, yet when ascertained, it was to be paid by one bill in one sum; in *Luke* v. *Lyde* there was no gross sum. *Byrne* v. *Pattinson*, reported in *Abbot* 319. is in point. In the case of *Smith* v. *Wilson*, 8 *East*, 437. it was held that a dispensation of the voyage and abandonment of the charter-party by the Defendant, did not enable the Plaintiff to recover in like manner as if he had performed the voyage. In the present case the captain could not know that the suspension of the voyage would not be merely temporary, yet he did not do so much to entitle himself, as was done in *Smith* v. *Wilson*, for upon his return to *England*, he abandoned the voyage, and never offered to renew and complete it, without which, freight *pro ratâ* has never been held recoverable. And as freight is not due here *pro ratâ itineris*, neither is it due *pro ratâ*, for the quantity of goods delivered. If a ship chartered for a specific sum for the voyage, should lose part of her cargo by the perils of the seas, she would earn no freight; for there could be no apportionment. The case of *Bright* v. *Cowper* proves that on the charter-party no freight is due. *Molloy b.* 2. *c.* 4. *s.* 9. recognizes this decision. Neither can any contract be implied to entitle the Plaintiff to freight. Abandoning the original contract, he states in his declaration a variety of circumstances, upon the whole of which he calls on the Court

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to deduce the conclusion, that freight is due; but there is no evidence of the existence of this substituted contract, because it is not proved that *Ross and Schleiden* were agents for the Defendant. Their act will bear only this interpretation, that seeing the Plaintiff in distress, they offered their assistance in landing the cargo for the benefit of all parties interested: it cannot be inferred that they substituted the port of *Gluckstadt* for *Hamburgh*. If the voyage had been insured, the going to *Gluckstadt* was a deviation, which, in case of a loss, would have discharged the insurers, who would have been liable, if the master, in obedience to the directions of the naval commander, had staid at *Cuxhaven*. *Ross* and *Schleiden*, in directing the Plaintiff to proceed to *Gluckstadt*, assumed a very large authority, and the fair inference to be drawn is, not that there was a new agreement binding upon the Defendant, a third person, resident in *Great Britain*, but a new agreement binding upon *Ross* and *Schleiden*, acting on their own account; and this construction solves all difficulties that may be suggested with regard to the relative situation of the parties, and acceptance of bills. But the Defendant is not liable to freight for another reason; because the Plaintiff had agreed by the bill of lading to resort for payment solely to the consignees, and he had in his own hands the means of enforcing the payment, which having neglected, he cannot therefore again recur to the Defendant. The master, being in possession of the goods under a bill of lading, was not bound to deliver the second keel, till he was paid his freight for the first: if he had observed this precaution, he would have prevented all risk In *Beawes, Lex Merc.* 114. it is laid down, that "if a ship be only "freighted outwards, and loaded by a factor, the goods "shipped are only liable for the freight, and no demands "to be made on the freighters in virtue of the charter-"party, but the person who receives the goods is to pay "it

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"it according to the tenor of the bill of lading." [*Mansfield* C. J. and *Lawrence* J. observed that the usual form of bills of lading expresses that the freight is to be paid on delivery, as it was in the case of *Penrose* v. *Wilkes*, reported *Abbot*, 276.; yet there the Court of King's Bench held, that the captain, by parting with the possession of the cargo, did not lose his claim for freight on the consignor; and that it might moreover be questioned, whether a master could claim any part of the freight, before he had delivered the whole cargo.] A captain who has signed a bill of lading, is not justified in delivering the goods otherwise than as therein expressed. By deviating from the directions of that instrument, the Plaintiff has discharged the Defendant, and can resort only to *Ross* and *Schleiden* as his debtors. At least the Defendant can be only a collateral security, and the Plaintiff cannot resort to him until he has shewn that *Ross* and *Schleiden* have refused payment. And he has discharged the Defendant by his negligence, in not applying to them at *Gluckstadt* for a good bill in payment. *Newland* v. *Horseman*, 2 *Rep. in Chan.* 74. A consignee by receiving goods under a bill of lading, which expresses that he is to pay the freight, makes himself debtor, and may be sued for the freight. *Roberts* v. *Holt*, 2 *Show.* 443. If a merchant in *Ireland* consign to a merchant here, and the master sign the bill of lading, the merchant here is liable for the freight. [The Court doubted the accuracy of this note, and conjectured that at least the goods must have been received, and observed, that it was settled by the authority of *Mason* v. *Lickharrow*, 1 *H. Bl.* 357. that the property does not pass by the master signing the bill of lading.] 2. It was the Plaintiff's duty to discharge the coals immediately on his return. The consignor was not then he owner of the cargo, but the consignees. He therefore was not entitled, if he had been willing, to receive it, and he pro-

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perly disclaimed it. 3. The Plaintiff received in satisfaction of his lesser demand for demurrage a draft upon the consignees. This was an agreement to look to them only, which discharges the Defendant: but even if this were not so, before he can recur to the Defendant upon this claim, that draft must be returned and accounted for. And the Plaintiff's laches in not giving the earliest notice of the non-payment, is a discharge. 4. The port-charges and pilotage ensue the freight. They were incurred for the benefit of the whole cargo, not of a part: if no freight is due, these are not due: if freight is due *pro ratâ*, only seven parts in seventeen of two-thirds of these charges are due, for the two-thirds were to be paid for the whole, but seven parts only of seventeen of the whole were delivered.

Cur. adv. vult.

MANSFIELD C. J. now delivered the judgment of the Court.

Various objections have been made to this verdict both at the trial, and upon the argument. First, that no freight at all was due, not even for the seven keels of coals delivered at *Gluckstadt*. The first special count in the declaration states a charter-party, which clearly had in contemplation an agreement for one voyage only, and that was to be from *Shields* to *Hamburgh*, and the coals on their arrival were to be delivered to the freighter or his assigns at such place or places to which the ship might safely come, and so to end the said intended voyage. The Defendant agrees that *he* would *pay* freight after the rate of 20*l*. per keel of coals, and so in proportion, by such money as should be required, and the residue by a good bill. It is the freighter then who undertakes to *pay*, and to pay by a good bill: this is a stipulation introduced for the benefit of the ship-owner; to the intent that he should not be left to his action upon the charter-

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charter-party, in which he must prove the performance of the voyage, but that he should have only to present his bill, in order to have it paid; or, if compelled to sue on it, he would have only to prove the hand-writing of the parties. The Defendant therefore bargains that *he* will take care that the bill shall be *delivered* to the Plaintiff. The coals are consigned to *Ross* and *Schleiden*, or to their assigns, by a bill of lading in the common form. The vessel arrives at *Cuxhaven*, which is in the course of the voyage, and is prevented from going to *Hamburgh*. While the master is there, *Ross* and *Schleiden* write to him to advance to *Gluckstadt*, which is also in the course of the voyage: that circumstance is not perhaps material, but it shews that there was no deviation, as was insisted upon. The ship is permitted to advance to *Gluckstadt*, where she is not able to discharge the whole 17 keels of coals, but she stays long enough to deliver seven keels, which are accepted at that port by the consignees. It is urged that the vessel does not go to *Hamburgh*; but the answer is, that those persons to whom the coals were consigned, desired that they might stop at *Gluckstadt*. The master then having delivered, and the consignees having accepted, this part of the cargo, is the master to receive nothing for carrying it? I can find no justice in that: it might as well be contended that if goods are sent to *Exeter*, and the consignee meets, and takes them at *Honiton*, the waggon must proceed empty to *Exeter*, or the carrier be entitled to nothing. But it is said, that the true meaning of the agreement and the bill of lading, taken together, is, not that the Defendant should be liable, but that the freight should be paid by *Ross* and *Schleiden*. What then is the meaning of the agreement, by which the freighter positively undertakes that the freight shall be paid for, after the rate of 20*l*. per keel, and that, by a good bill? To say that the Defendant is not liable, would be wholly to do away this contract. I there-

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therefore think that the Plaintiff is entitled to recover the 140*l.* given him for the freight of the seven keels. With regard to the demurrage after the ships return home, in some situations of events that point would be doubtful. Where a ship is chartered upon one voyage outwards only, with no reference to her return, and no contemplation of a disappointment happening, no decision which I have been able to find, determines what shall be done in case the voyage is defeated: the books throw no light on the subject. The natural justice of the matter seems obvious; that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned. But it appears to be wholly voluntary; I do not know that he is bound to do it: and yet, if it were a cargo of cloth or other valuable merchandize, it would be of great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided. But in this case the Plaintiff labours under a further difficulty, that we do not know how the dealings stand between the Defendant and *Ross* and *Schleiden*. There may have been an absolute sale, and the property may no longer continue in the Defendant. Or the coals may have been consigned to be sold on commission by *Ross* and *Schleiden* as agents. But upon reading the bill of sale, which contains a general consignment, we must presume that the goods were absolutely sold to *Ross* and *Schleiden*, and that the property therefore is in them. If that is the case, all that has been done for the preservation of the cargo, has been done, not for *Row* but for the benefit of *Ross* and *Schleiden*, and if any liability is raised by implication of law, the right of action is against them. The Plaintiff therefore is not entitled to recover this sum of 70*l.* for demurrage. As to the 10*l.* for demurrage before the voyage, the Defendant is clearly liable, upon the agreement to pay that sum, endorsed on the charter-

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party. It was thereby *agreed*, that the master was to be paid the 10*l*. which Messrs. *Ross* and *Schleiden* were desired to have the goodness to pay to him. It was contended that this was merely a draft, but it is nothing more than a request to *Ross Schleiden*; and the contrary interpretation would entirely do away the sense of the indorsement. I have said nothing as to the claim for freight back, nor could it be recovered in this action, as the declaration contains no demand adapted to it; but it probably would stand upon the same ground as the right to the demurrage claimed after the ship's return. I do not know how we can divide the pilotage and port-charges: if the cargo had consisted of 7 keels only instead of 17, the same amount of port-charges must equally have been paid. The verdict therefore must stand for the first, third, and fourth items, amounting to 170*l*.

The Defendant's rule was made Absolute for reducing the verdict by striking out the sum of 70*l*. and Discharged as to the residue.

The Plaintiff's rule for increasing the damages was discharged.

REGULA GENERALIS.

IT IS ORDERED, That the secondaries of this Court shall, from and after the first day of next *Trinity* term, keep a book, in which shall be entered all the Rules which from time to time shall be delivered out in ejectment, instead of the present book containing a list of the ejectments moved, in which book shall be mentioned the number of the entry, the county in which the premises lie, the names of the nominal Plaintiff, the first lessor of the Plaintiff, with the words "and others," (if there be more than one), and also the name of the casual ejector.—AND IT IS FURTHER ORDERED, That unless the Rule for judgment be drawn up and taken away from the office of the secondaries within two days after the end of the term in which the ejectment shall be moved, no Rule shall be drawn up or entered in the book, nor shall any proceedings be had in such ejectment.

J. MANSFIELD
I. HEATH.
S. LAWRENCE.
A. CHAMBRE.

MEMORANDUM

AT the end of this term *William Manley* Esq. of the Middle Temple, and *Albert Pell* Esq. and *William Rough* Esq. of the Inner Temple, were called Serjeants, and took for their motto "*Pro Rege et Lege.*"

END OF EASTER TERM.

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CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Trinity Term,

In the Forty-eighth Year of the Reign of GEORGE III.

June 18.

MUCKLOW and Others, Assignees of ROYLAND, *v.* MANGLES.

If a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him.

TROVER by the assignees of a bankrupt for a barge and other effects. Upon the trial before *Mansfield* C. J. at *Westminster*, at the sittings in this term, it way proved that *Royland*, who was a barge-builder, had undertaken to build the barge in question for *Pocock*. Before the work was begun, *Pocock* advanced to *Royland* some money on account, and as it proceeded, he paid him more, to the amount of 190*l.* in all, being the whole value of the barge. When it was nearly finished, *Pocock's* name was painted on the stern. Two days after the completion of the work, and before a commission of bankrupt had issued, the Defendant, who was an officer of the sheriff of *Middlesex*, under an execution against *Royland*

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Royland, took this barge, which had not then been delivered to *Pocock*, but gave it up to him under an indemnity. The jury found a verdict for the Plaintiff.

Best Serjt. now moved that the sum of 190*l*., the value of the barge, might be deducted from the amount of the verdict, inasmuch as the property had absolutely vested in *Pocock*, who had paid for the barge, and could, he said, have recovered it in trover against *Royland*; and the assignees could not be in a better condition than *Royland* himself. This was not such a permissive possession in the bankrupt, as is described in the stat. 21 *Jac.* 1 *c.* 19. for the bankrupt had not had time to deliver it after it was finished. *Ex parte Flinn* and *Field*, 1 *Atk.* 185. *Flinn* and *Field* bought of *Matthews*, and paid for, two-thirds of five hundred barrels of tar, the whole to be sold by them for account as follows, two-thirds their account, and one-third *Matthews's* account; *Matthews* to bear charges of cartage and porterage in sending off. *Matthews* becoming a bankrupt, the Chancellor on petition held, that *Flinn* and *Field* were entitled to two-thirds of the tar, for that this was only a temporary custody, till the petitioners could conveniently ship it for *Ireland*, and it could not with propriety be said that the tar was in the "possession, order, and disposition" of the bankrupt.

MANSFIELD C. J. The only effect of the payment, is, that the bankrupt was under a contract to finish the barge: that is quite a different thing from a contract of sale, and until the barge was finished we cannot say that it was so far *Pocock*'s property, that he could have taken it away. It was not finished at the time when *Royland* committed the act of bankruptcy: it was finished only two days before the execution. In the case cited it was necessarily held that the tar was not in the possession of

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the bankrupt; otherwise, in every case of tenancy in common with a bankrupt, the act of bankruptcy would vest the entire property of the chattel in his assignees.

HEATH J. This is the species of contract which in the civil law is described by the term, *Do ut facias.* It comes within the cases which have been held to be executory contracts, and as such not within the statute of frauds, as contracts for the sale of goods. A tradesman often finishes goods, which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods so sold. The painting of the name on the stern in this case makes no difference. If the thing be in existence at the time of the order, the property of it passes by the contract, but not so, where the subject is to be made.

LAWRENCE J. I am of the same opinion. No property vests till the thing is finished and delivered.

The Court refused the Rule.

June 27.

GLENDINING v. ROBINSON.

If a Defendant become bankrupt, and be required to appear to a commission in a distant county, the Court will enlarge the time for the bail to surrender him, till a reasonable time after the end of his last examination before the commissioners.

VAUGHAN Serjt. had on a former day obtained a rule *nisi* that the bail might have time given them to surrender the Defendant, until a week after he should have finished his examination under a commission of bankrupt. Both the bail and the Defendant resided near

White

Whitehaven, 320 miles from *London*, and the Defendant was required to surrender himself to the commissioners at *Whitehaven*, and finish his examination at their last sitting there. If the bail should be obliged to surrender him before that time, it would become necessary for the commissioners to come up to *London* to take his examination.

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Best Serjt. now shewed cause against this rule, on the ground that the commissioners might at pleasure enlarge the time for the last examination, and thereby might deprive the Plaintiff of the fruit of his judgment. He also intimated a doubt of the power of the Court to grant this indulgence.

Vaughan Serjt., in support of the rule, said that a similar rule had been made absolute in the Court of King's Bench that same day. He also cited *Maude* v. *Jowett*, 3 *East*, 145. where the like rule had been obtained, and though it was discharged in terms, the full effect of it was secured by the conditions there imposed on the Plaintiff. He also compared this to the case of bail for an alien sent out of the realm under the alien act. *Merrick* v. *Vaucher*, 6 *Term Rep*. 50. where the Court held that the bail were discharged, because the Defendant's situation was changed by act of law.

The Court considered it reasonable that the bail should have a fortnight from the end of the Defendant's last examination, to surrender him; at the same time imposing on them the terms of paying the costs of the application, and of undertaking to give the Plaintiff notice when the last examination should be finished. To prevent delay, the Plaintiff was permitted forthwith to sue out a *scire facias* against the bail, undertaking not to pro-

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ceed thereupon, unless they should fail to surrender their principal at the expiration of the time given them. Upon these terms

The rule was made absolute.

July 27.

THOMPSON and Wife, Executrix, v. STENT.

A count on an *insimul computassent* with the Plaintiff as executor, may be joined with a count for goods sold by the testator.

The criterion whether the counts are misjoined, is, whether the money, if recovered, will be assets in the hands of the executor. And if it will, the executor, declaring as such, is not liable to the costs of those counts on which assets will be recovered.

IN this case the Plaintiffs declared that the Defendant was indebted to their testator in his lifetime for goods sold, and money lent, and upon an account stated with the testator, and averred that the Defendant had undertaken to pay their testator, but had not yet paid those debts, though requested, to the testator in his lifetime, or to the Plaintiff *Mary*, his executrix, since his death, or to both the Plaintiffs since their intermarriage. They also declared that the Defendant was indebted to the testator in his lifetime for goods sold, and money lent, and after his decease undertook to pay the said *Wm. Thompson* and *Mary* as executrix. The last count averred that the Defendant was indebted to the said *William Thompson* and *Mary* as executrix upon an account stated with him and her as executrix, and had not paid the sums claimed by the three last counts to the said *William Thompson* and *Mary* as executrix, or either of them. The Defendant demurred, and assigned for cause that the Plaintiffs had joined in the same declaration causes of action accruing in several distinct rights, characters, and capacities, namely, causes of action which were stated to have accrued to the deceased in his lifetime, and causes of action which must have accrued, and were stated to have accrued, to the said *William Thompson* and *Mary*, since the testator's death; and that upon the declaration, in the event of a verdict passing for the Defendant, or of the said

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said *William Thompson* and *Mary* failing in the declaration, and taking nothing by their writ, there must be two several and distinct judgments for costs, namely, as to part, to be levied of the goods of the testator; and as to the other part thereof, of the proper goods and chattels of the said *William Thompson* and *Mary*, who as a married woman could have no proper goods and chattels, or of the said *William Thompson*, who was not executor, or appeared to have ever acted as such; and that the last count alleged the account to have been stated, concerning monies due to the Plaintiffs after the death of the testator, and a supposed promise grounded thereon and made subsequent to the testator's death, which must have accrued to them in their own rights. And that there was a misjoinder of action in the said declaration, and two several and distinct conclusions.

Best Serjt., in support of the demurrer, attempted to distinguish this case from that of *Cowell* v. *Watts*, 6 *East*, 405. because upon the first class of counts in this declaration the Plaintiffs could not have sued in their personal character, but only as executors. The debts, in all the counts except the last, are averred to have accrued in the lifetime of the testator, but upon one class of counts the promise to pay is alleged to have been made to the testator, in the other to the representative: upon the first class, therefore, if the Plaintiff fail, the Defendant will be entitled to no costs; upon the second class, he will have costs. In *Cowell* v. *Watts* the administratrix might have recovered in her personal character upon all the causes of action stated in the declaration; there, if the Defendant had succeeded, he would have been entitled to costs upon all the counts. Where the Plaintiff can only declare as executor, he shall pay no costs; where he may recover in his own right, his stiling himself

 executor

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executor shall not exempt him from the payment of costs.

Lens. Serjt. *contrà,* was stopped by

The Court, who declared that both the points of this case were decided in the case of *Elwes* v. *Mocatto,* cited in *Jenkins* v. *Plume,* 6 *Mod.* 91. S. C. 1 *Salk.* 207. where it was held, that upon an *insimul computasset* with an executor, the Defendant was not entitled to costs; because the promise upon the *insimul computasset* begat no new cause of action, but only ascertained the old cause of action. And in *Bull* v. *Palmer, T. Jon.* 47. upon a similar count, it was determined, that since the money, if recovered, would be assets, no costs were payable by the Plaintiff. The same point was recognized in an action against an administrator. *Secar* v. *Atkinson,* 1 *H. Bl.* 102. And the Court observed that judgment had been given without sufficient consideration in a case of *Stickle* v. *Pearson,* argued in the Exchequer-chamber in 1807, where a count for goods of the intestate, sold by the administrator, after the intestate's decease, was joined with a count for debts due to the testator, and the judgment was reversed.

Judgment for the Plaintiff.

(IN THE HOUSE OF LORDS.)

LUCENA *v.* CRAUFURD and Others. In Error.

June 29.

Commissioners were authorized by a commission granted in pursuance of a statute, to take into their possession ships and goods belonging to subjects of the *United Provinces*, which had been or might be detained in or brought into the ports of this kingdom, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they should receive from the king in council; before any declaration of war against the *United Provinces*, one of his majesty's ships took several *Dutch East Indiamen*, and carried them into *St. Helena*. The commissioners, with the assent of the Lords of the Treasury, insured them at and from *St. Helena* to *London*. War was soon after declared against the *United Provinces*, and the ships were finally condemned as prize to his majesty, "as having belonged, "when taken, to subjects of the *United Provinces*, since become enemies." Upon a loss happening, the commissioners declared on the policy, and averred the interest to be in the king, and held that the action well lay.

THIS was an action brought in the Court of King's Bench, by the Defendants in error, against the Plaintiff in error, upon a policy of assurance. The three first counts of the declaration were in substance as follow:

The first count averred, that the king, by virtue of the powers vested in him by the stat. 35 *G.* 3. *c.* 80. had issued his commission under the great seal to *James Craufurd, John Brickwood, Allen Chatfield, John Bowles,* and *Alexander Baxter* directed, thereby nominating them commissioners for the purposes mentioned in that act, and authorizing them to take all such ships and cargoes, goods, &c. into their possession and under their care, as his majesty could or might, by virtue of that act, authorize them to take into their possession and under their care, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they should from time to time receive from his majesty in council, and otherwise, in all respects, according to the said act; and also to give such directions respecting the proceeds of the sales of any cargoes mentioned in the said act to have been ordered to be sold, as the commissioners to be appointed under that act were therein and thereby required and authorized to give respecting the

same,

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same, and authorizing and empowering them to execute all and singular such duties, matters, and things, as his majesty could or might authorize or require to be executed by the commissioners to be appointed under that act. That on the 10th of *June* 1795, certain ships, called the *Houghley, Alblasserdam, Dordrecht, Zeelelye, Meermin, Agatha, Mentor,* and *Surcheance,* with cargoes on board, being ships and goods belonging to subjects and inhabitants of the *United Provinces,* coming from certain parts of *Asia* and *Africa,* and bound to certain ports of the *United Provinces,* were by virtue of his majesty's orders, taken at sea in their said voyage, by the commander of one of his majesty's ships of war, in company with some ships in the service of the *East India* Company, in order and to the intent that such ships and goods might be brought into the ports of this kingdom: and such ships, with such goods on board, had been carried into *St. Helena* for the purpose of being brought from thence to some port of this kingdom. And the Plaintiffs so being such commissioners, they, on the 22d of *August* in that year, effected a certain policy, purporting that the Plaintiffs, by the description of the Commissioners for Sale of *Dutch* Property, the same being their usual style, as well in their own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance, lost or not lost, at and from *St. Helena* to *London,* at the rate of eight guineas *per cent.* to return 3*l. per cent.* in case they departed with convoy for *England* and arrived, on ships and goods, to wit, *Houghley, Alblasserdam, Dordrecht, Zeelelye, Meermin, Agatha, Mentor,* and *Surcheance,* as should be thereafter declared and valued. That the Plaintiff in error subscribed the policy for 2000*l.* That notice of the losses and misfortunes which befel the said ships and goods arrived in this kingdom before any declaration or

valuation

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valuation was or could be made of the said ships and goods; that before the making of the policy, and before the sailing of the ships on their voyage, to wit, on the 2d of *July* in the same year, the ships were in good safety at *St. Helena*, having the same goods on board, and which goods remained loaded aboard the said ships at *St. Helena* during the whole of their stay there; and which ships, with the said goods on board, were about to proceed on a voyage from *St. Helena* to *London*; and that the said ships and goods were ships and goods which, if they had arrived at *London* from the said voyage, the Plaintiffs, as such commissioners, were and would, upon such arrival, have been authorized to take into their possession and under their care, and to manage, sell, and dispose of the same according to the said commission and act of parliament, and which were intended to be brought from *St. Helena* to *London* for those purposes on the voyage in the policy mentioned. And that they, as such commissioners under the said act and commission, at the time of the sailing of the ships from *St. Helena*, and from thence until and at the times of the several losses, were interested in the ships and goods to the amount of all the money insured. And that the insurance was made for their use, benefit, and account, as such commissioners; that the ships, with the said goods on board, did afterwards, and before the 22d of *August*, to wit, on the 2d of *July*, set sail from *St. Helena* with convoy for *England* on their intended voyage to *London*; that during the voyage the *Houghley* and *Surcheance*, with their cargoes, and the *Dordrecht*, were, on the 1st, 5th, and 13th of *September* respectively, lost and damaged by perils of the seas, and the cargo of the *Dordrecht* was obliged to be taken out of her and carried to *London*. And that the *Zeelelye*, on the 20th of *September*, was by violence of the winds, cast upon rocks, bulged, and lost, with the goods on board, whereby the Plaintiffs, as such commissioners, sustained an

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an average loss of 40*l. per cent.* The second count differed from the first, only in the averment of interest, which was, "that on the 2d of *July*, and from thence until *and at the times of the several losses, his majesty was interested in the ships and goods to the amount of all the money by the Plaintiffs, as such commissioners, for and on account of his majesty ever insured thereon; and that the insurance was so made by them as such commissioners for the use, benefit, and account of his majesty, and that they were the persons who gave the order and directions to the agent immediately employed to negociate and effect the policy.*" The third count differed only in averring no interest in any one, but it averred that the ships therein mentioned were not, nor were or was any of them, ships or ship, belonging to his majesty or any of his subjects before or at the time of making the assurance, or at the times of the losses.

The cause was tried at the Sittings after *Michaelmas* term 1806, before Lord *Ellenborough*, when a verdict was found for the Plaintiffs below upon the second count of the declaration, and for the Defendant below upon all the other counts. The judgment of the Court of King's Bench was pronounced accordingly, but a bill of exceptions having been tendered to the Chief Justice, at the trial, by the counsel for the Defendant below, the same was made a part of the record, and removed therewith by writ of error into the House of Lords.

The bill of exceptions in substance stated that the Plaintiffs, to maintain the issue, joined upon the second count of the declaration, gave in evidence a certain commission by letters patent under the great seal, granted by the king in council, in pursuance of the said act, to the Plaintiffs, bearing date the 13th of *June* 1795, by which, after reciting as well the preambles as the enactments of the stat. 35 G. 3. *c.* 80. *ss.* 21 and 38. his majesty constituted the Plaintiffs commissioners for the purposes mentioned

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tioned in the act, and did authorize and require them to take all such ships and cargoes, &c. into their possession and under their care, as his majesty could or might, by virtue of the said act, authorize them to take into their possession and under their care, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they should from time to time receive from the king in council, and otherwise in all respects according to the said recited act, and also to give such directions respecting the proceeds of the sales of any cargoes mentioned in the said act to have been ordered to be sold, as the commissioners were therein and thereby required and authorized to give respecting the same, thereby also giving and granting to the Plaintiffs all and singular such powers and authorities, and authorizing and empowering them to execute all such duties, acts, matters, and things as his majesty could or might give or grant, or authorize or require to be executed by the commissioners to be appointed by him under that act. The Plaintiffs further proved, that the Lords of the Admiralty had, on the 16th of *February* 1795, transmitted to the commanding officers of his majesty's fleet certain additional instructions, under his sign manual, bearing date the 9th of *February*, and requiring the commanders of his majesty's ships of war, and privateers that had or might have letters of marque against *France*, to bring into the ports of this kingdom all *Dutch* vessels bound to or from any ports in *Holland*, in order that they, together with their cargoes, being *Dutch* property, might be detained provisionally. They also proved, that before the making of the policy, on the 10th of *June* 1795, there being at that time no declaration of war between his majesty and the *United Provinces*, the *Houghley*, *Alblasserdam*, *Dordrecht*, *Zeelelye*, *Meermin*, *Agatha*, *Mentor*, and *Surcheance*, with cargoes of goods on board, being ships and goods belonging to subjects and inhabitants of the *United Provinces*, coming from certain parts of *Asia* and *Africa*, and

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and bound to certain ports of the *United Provinces*, were by virtue of the instructions and the order of the Lords of the Admiralty, seized and taken at sea, on their voyage from *Asia* and *Africa* to the *United Provinces*, by Captain *Essington*, commander of the *Sceptre*, in company with some ships in the *East India* Company's service, in order and to the intent that such ships and goods, might be brought into the ports of this kingdom; and such ships, with such goods on board, had been carried into *St. Helena* for the purpose of being brought from thence to some port or ports of this kingdom. The Plaintiffs also proved, that the Defendant subscribed the policy on the 22d of *August* 1795, and that notice of the losses and misfortunes which befel the said ships and goods arrived in this kingdom before any declaration or valuation was or could be made of the said ships and goods; that the Plaintiffs were the persons who gave the order for the policy; and that, on the 2d of *July*, the ships were in safety, with the goods on board, at *St. Helena*, and were about to proceed upon the voyage averred, and were intended to be brought from *St. Helena* to *London*, and on that day sailed from *St. Helena* with convoy for *England*, upon the said voyage, and that before their arrival at *London* the *Houghley*, *Surcheance*, *Dordrecht*, and *Zeelelye*, with their cargoes, were, at the times and in the manner in the second count mentioned, damaged, lost, and destroyed; and that an average or partial loss of 40*l*. *per cent*. was sustained upon all the ships and goods insured, and that the *Alblasserdam*, *Meermin*, *Agatha* and *Mentor*, with the goods on board thereof, arrived in this kingdom in the course of the year 1796. The Plaintiffs also produced a letter from Mr. *Rose*, the then secretary to the Lords of the Treasury, addressed to the Plaintiffs as such commissioners, dated the 22d of *August* 1795, and communicating, by the command of the Lords of the Treasury, their opinion that the *Dutch East Indiamen* captured near *St. Helena*, and then on their

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their passage to this country, should be insured from sea-risk and enemy, and desiring that the Plaintiffs would take the necessary steps for insuring them accordingly. Mr. *Rose* also proved that it is an usual practice at the treasury to give directions by parol in the first instance, and afterwards to send a written authority, and also that the Lords of the Treasury had, on the 11th of *August* preceding, refused their authority for insuring the said ships and goods, and directed the letter of that date, hereinafter set forth, to be written and sent to the Plaintiffs, but afterwards approved of the insurance having been effected.

The material parts of the evidence on the part of the Defendant consisted of a letter from Mr. *Rose*, dated the 11th of *August* 1795, informing the commissioners for the sale of *Dutch* property that, in reply to their application, he was commanded by the Lords of the Treasury to acquaint them, that their lordships were of opinion, it would not be necessary to insure the *Dutch East India* ships or their cargoes from *St. Helena*; the order of his majesty in council, dated the 16th of *January* 1795, by which it was ordered, that all goods and effects coming directly from any of the ports of the *United Provinces*, to any of the ports of this kingdom, in the vessels of any country, and navigated in any manner, should be permitted, until further order, to be landed and to be secured in warehouses under the joint locks of his majesty and of the proprietors, at the risk and expence of the proprietors, there to remain in safe custody for the benefit of the proprietors, until due provision should be made by law to enable such proprietor to re-export or otherwise dispose of the same; and the order in council of the 21st of *January* 1795, which directed that all goods and effects whatsoever, belonging to any of the subjects or inhabitants of the *United Provinces*, or belonging to any subject of his majesty, or to any subject of

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of any country in amity with his majesty, coming from any part of *Europe, Asia, Africa*, or *America*, in amity with his majesty, in vessels belonging to any subject or inhabitant of the *United Provinces*, or to any subject of his majesty, or of any country in amity with his majesty, and bound to any port of the *United Provinces*, might, until further order, be permitted to be landed in any port of this kingdom, and might be secured in warehouses for the benefit of the proprietors, in the same manner as was directed in the abovementioned order. The Defendant also gave in evidence, certain instructions given by the king in council to the Plaintiffs, on the 13th of *June*, in the same year, by which, after reciting that by virtue of the powers vested in his majesty by the act 35 *G*. 3. *c*. 80. his majesty had issued the commission before mentioned, the commissioners were directed forthwith to take into their possession, and under their care, all such ships, goods, and effects, according to such lists thereof, as they should from time to time receive from the commissioners of the customs in *England* and *Scotland* respectively, in pursuance of directions which they would receive from the Lords of the Treasury, for the purposes above mentioned. And the Plaintiffs were required to be careful to execute the directions given them in the several clauses of the act, and in all cases of doubt or difficulty, they were to apply to the privy council for further instructions. The Defendant also gave in evidence the king's proclamation of the 15th of *September* 1795, containing an order for general reprisals against the ships, goods, and subjects of the *United Provinces*, and an order made on the 26th of *November* by the Lords of the Privy Council, by which, after reciting that four *Dutch East Indiamen*, the *Alblasserdam*, the *Vrow Agatha*, the *Mentor*, and the *Dordrecht*, then lying in the *Shannon*, in *Ireland*, had been sent in thither by the *Sceptre*, commanded by *William Essington* Esq. or by other ships

under

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under his command, antecedent to the order in council for granting general reprisals, and that agents had been appointed by Captain *Essington*, and others concerned in sending in the said vessels: and that the sole interest in all ships so sent in was vested in his majesty, and the appointment of agents for the care and disposal thereof did of right belong to his majesty, it was ordered in council that the Plaintiffs should be the agents on behalf of his majesty, for the care and management of the said four *Dutch* ships and their cargoes. The Defendant further proved, that the Plaintiffs, by virtue of that order of council, took possession of the *Albasserdam*, *Mentor*, *Agatha*, and *Dordrecht*, in *Ireland*. The Plaintiffs then produced in evidence certain instructions given by his majesty to his High Court of Admiralty, on the 10th day of *October*, 1795, whereby, after reciting the powers conferred on his majesty by the stat 35 *G.* 3. *c.* 80., and the commission which had issued thereupon, and that *the commissioners* so appointed had taken possession of many ships and goods belonging to the subjects and inhabitants of the *United Provinces*: and that since the issuing of the commission his majesty had ordered general reprisals to be granted against the ships, goods, and subjects of the *United Provinces*, and had issued a commission authorizing the Lords of the Admiralty to require the High Court of Admiralty of *Great Britain* to take cognizance of, and judicially proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships and goods that were or should be taken, and to hear and determine the same, and, according to the course of the admiralty and the law of nations, to adjudge and condemn all such ships and goods as should belong to the *United Provinces*, or their vassals or subjects, or to any other inhabiting within any of their countries, territories, or dominions, his majesty directed that the Court of Admiralty should proceed to the adjudication of such ships and goods of

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which possession had been taken or should be taken by the said commissioners, as should be proceeded against by his majesty's advocate general on his behalf, in order that the same, being the property of the *United Provinces*, or their subjects, might be condemned to his majesty as good and lawful prize, reserving, nevertheless, to the said commissioners, the care, sale, and management thereof, as well before as after final adjudication, according to the provisions of the said act. The Plaintiffs also gave in evidence the proceedings and sentences of the High Court of Admiralty, by which the *Houghley*, *Zeelelye*, *Surcheance*, *Dordrecht*, *Alblasserdam*, *Meermin*, *Vrow Agatha*, and *Mentor*, and their respective cargoes, were pronounced to have been taken before the declaration of hostilities against the *Dutch*, and to have then belonged to subjects of the States General of the *United Provinces*, now enemies of the crown of *Great Britian*, and as such, or otherwise, subject and liable to confiscation, and the same were thereby condemned as good and lawful prize to his majesty.

The bill of exceptions further stated, that the counsel for the Defendant insisted that, upon the evidence, the Plaintiffs could not, in point of law, maintain the issue on the second count of the declaration; first, because the evidence did not prove that his majesty was, at the time when the ships and goods sailed from *St. Helena*, nor when the insurance was effected, nor from thence until and at the time of the loss of the *Houghley* and *Surcheance*, interested in the ships and goods insured, or any or either of them, to any amount or in any manner whatsoever, so that a legal and valid insurance could be effected thereon on account of his majesty by the Plaintiffs. And, 2dly, because it did not appear, nor could legally be inferred from any thing which had been given in evidence, that the Plaintiffs were legally authorized to effect the insurance on account of his majesty, or

or that the insurance effected by the Plaintiffs had been legally adopted by or on behalf of his majesty. But that the Chief Justice directed the jury, that upon the evidence the Plaintiffs might maintain the issue as to the second count, and that his majesty, at the times when the ships and goods sailed from *St. Helena*, and when the policy was effected, and from thence until and at the time of the loss of the *Houghley* and *Surcheance*, had an insurable interest in the said ships and goods; and further that, if any of his majesty's subjects effect an insurance for the benefit and account of his majesty, his majesty may legally adopt and ratify the same, and that the insurance in the second count mentioned was adopted and ratified by his majesty, and the jury gave their verdict for the Plaintiffs as to the second count, with 800*l.* damages, and for the Defendant as to all the other counts.

RALPH CARR, for the Plaintiff in Error.
J. A. PARK, for the Defendant in Error.

The Plaintiff in error assigned errors generally upon the insufficiency of the declaration, the misdirection of the Chief Justice, the verdict on the second count, and the judgment, and stated in support of his assignment the following reasons:

1. Because a policy of assurance is a contract of indemnity, and therefore requires that the person on whose account it is effected should be interested at the time in the property insured; and because his majesty, neither at the time when the risk commenced, nor when the policy was effected, nor at the period of the loss of the *Houghley* and *Surcheance*, had any interest in the ship and goods insured, whereon a valid insurance could be effected.

2. Because the ships and goods insured were, at the time when the risk commenced, when the policy was effected, and at time of the loss of the *Houghley* and *Surcheance*, the property of certain citizens of the *United*

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Provinces, between which country and *Great Britain* there then existed peace.

3. Because this insurance was effected by the Defendants in error, as commissioners, *and as in their own right, under a supposed interest,* inherent in that character, and not on account of or in behalf of his majesty.

4. Because the Defendants in error, at the time when the insurance was effected, had not any authority to effect any insurance on account of his majesty.

5. Because an insurance, which is illegal and void at the time when it is effected, cannot be made valid by matter subsequent to the contract.

6. Because this insurance was not legally adopted or ratified by his majesty.

S. SHEPHERD.
RALPH CARR.

The Defendants in error prayed that the judgment might be affirmed, for the following, amongst other reasons:

1. Because the *United Provinces*, to the inhabitants whereof the ships and goods in question, until the seizure thereof by his majesty, belonged, were, at the time of such seizure, under the power and controul of *France*, then being in open hostility against his majesty: that under these circumstances, his majesty, by virtue of his undoubted prerogative, had caused the said ships and goods to be seized, in order that the same might be brought into this kingdom, and there detained provisionally; whereby his majesty had acquired the lawful possession thereof, and an inchoate right of property in the same; and that the said ships and goods were afterwards regularly condemned to his majesty as good and lawful prize, by the High Court of Admiralty, being a court in that behalf of competent and conclusive jurisdiction.

2. That it is a principle of law, that every ratification of any act done for a man's benefit, relates back to the

time

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time of doing it, and has the effect of a previous order. That if this principle applies, as it does, to the case of common persons, it applies more strongly to acts done for the benefit of his majesty by any of his subjects, and afterwards adopted and ratified by his majesty; for every subject is bound to do all acts in his power for the benefit of his majesty. And still more strongly does it apply to the present case, where the commissioners, who caused the insurance in question to be effected for his majesty's benefit, were so far from being strangers to the subject-matter of the insurance, that they were the persons expressly authorized by his majesty's commission, grounded on the act of parliament therein referred to, to take the ships and goods insured under their care upon the arrival thereof in this kingdom, and to manage, sell, and dispose of the same, as might be expedient for the benefit of his majesty.

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JOHN RICHARDSON.

Shepherd Serjt. for the Plaintiffs in error, reduced his objections to three; 1. That his majesty had no interest in the ships. 2. That the insurance was not made on behalf of his majesty. 3. That the insurance had not been ratified on behalf of his majesty.

1. The allegation of interest is essential. To constitute an insurable interest, it is at least necessary that there should be a right existing, and vested, at the time of the insurance. If not, any speculation or expectation of profit is an insurable interest. In the one case the right exists, though not the benefit; in the other case, the right is to commence *in futuro*, as well as the benefit. Supposing that profits are insurable, yet in the case of *Grant* v. *Parkinson*, *Park*, 354. 6th ed. the assured had an existing right to all the profits the cargo might produce.

 But

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But his majesty had no right to these ships at the time of this insurance. Whether capture gives the crown an inchoate right, to be confirmed by the sentence of condemnation, or, more properly, an absolute right, subject to be defeated by a future adjudication; at all events, after capture, the right is *in esse*. But the act of seizing these ships was no capture, nor was it in any respect an hostile act, nor distinguishable from an embargo in any of its consequences, or in any circumstance, except that it was a detention of the ships at sea instead of in port; which is the more usual case of an embargo. The act did not transfer the property to his majesty, although it might, like any other embargo, be a very proper exercise of the prerogative; for an embargo does not change the property in the ships of amicable powers lying in our ports, either of itself, or in the event of war being declared before the embargo is taken off. The right to the ships, which in that case are thenceforth detained as prize, accrues only from the time, and by the commencement of hostilities. The only difference made in the statute between the regulations of ships and cargoes brought in hither by *Dutch* subjects, and those brought in by his majesty's officers, was merely founded upon this: that in the one case, the proprietor being present, was directed to manage his own property; in the other, the owners being absent, agents were appointed to manage the goods for them. Until the declaration of hostilities the king had merely a prospect or speculation of future interest; if he had an insurable interest before that event, it follows that whenever goods are detained here under an embargo, the possibility that before the embargo is taken off war may be declared against the power to which they belong, gives the king an insurable interest in them. He might equally be said to have an interest in an enemy's ships at sea, or blockaded in port: for he might expect to capture them, and might there-

fore

fore insure them against being destroyed by the enemy. Such a case renders apparent the absurdity of the proposition, that insurable interest does not depend on existing rights, but may be founded upon rights to be acquired after the insurance. The sentences of condemnation afford no answer to this objection: they only prove that the persons to whom the goods belonged were enemies at the time of the condemnation, but they do not shew that any interest was vested in the king at the time of the insurance. The *Dutch* subjects, whose security was one principal purpose, at least, of this statute, were, at the time of effecting this policy, the owners, and possessed the only insurable interest in these ships; which they would have retained to this day, but for the declaration of hostilities. If the king was entitled to insure before that event, it follows that during a certain period both might insure in respect of the same indentical interest in the same ship or goods, and for the same time. The Court must at this time determine on the same grounds as if the loss had happened on the very next day after effecting the policy, and the cause had been decided on the day after; and the Court would then have been compelled to say that the crown had no interest. 2. Whatsoever may be the right of a principal to ratify, it must appear that the contract was made for and on the account of the party ratifying. But this policy was effected by the Defendants in error, as commissioners for the sale of *Dutch* property, in their official capacity created by statute, not as agents for the crown. The answer of the Lords of the Treasury is addressed to them under the former title; it merely conveys the opinion of certain great officers of the crown that it would be adviseable to insure, but it does not say that the property should be insured in the name, or on the behalf of the crown. If a broker, having been employed by an order couched in these terms, had insured the ships and goods, specifi-

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cally and absolutely as the property of the *Dutch* proprietors, he would not have been responsible for any misconduct in not having insured them on the behalf of his majesty. If he had insured them in the name of the crown, he could not, relying on this letter, have called upon the crown by petition of right or otherwise to reimburse him the premium. The advice which the crown gave under the belief that the interest was in others, cannot entitle his majesty to the benefit of the policy, though the interest should afterwards prove to be in himself. If the insurance is once effected for the benefit of *A.*, *B.* has no right at a subsequent time to adopt it. Conceding that a policy effected for all whom it may concern, might in many cases be good, yet if the broker had received from *A.* no instructions to insure, he could not afterwards declare the interest to be in *A.* And it is immaterial whether it appears on the face of the policy, or is extrinsically shewn, that the insurance was not effected for the benefit of the person interested. 3. There is no other subsequent ratification of the contract, than the letter from the Lords of the Treasury written on the day of effecting the policy, its effect extends no further, if considered as a ratification, than it does if considered as a previous authority; and in either point of view it amounts only to a declaration that it was a wise act of management in the *Dutch* commissioners to insure the property.

R. Carr was to have argued on the same side, but was prevented by indisposition, and the Court having strongly intimated their opinion, the Plaintiff in error, on the following day, waived the privilege of being further heard by council, whereupon their Lordships, without calling upon the Defendants in error for any argument,

Affirmed the Judgment.

CHAPMAN and Another *v.* HAW.

A plaintiff may, without consulting his attorney, compromise an action with the Defendant, and take on himself the payment of the costs to the attorney, if there be no fraudulent conspiracy to cheat the attorney of his costs.

BEST Serjt. had on a former day obtained a rule *nisi* to set aside the judgment and execution in this case, and to return the money which had been levied. The action was brought to recover back the sum of five guineas which had been paid to the Defendant for procuring a sailor, the man having refused to proceed upon the voyage. An interlocutory judgment had been signed, and notice given that a writ of inquiry would be executed on the 27th of *May*. On the 24th, one of the Plaintiffs meeting the Defendant, offered to compromise the matter, if the Defendant would pay him the five guineas, and a guinea towards the costs; and said that he would himself pay the rest of the costs, and give the Defendant a full discharge, and direct his attorney to stay further proceedings. The Defendant paid him the money, and the Plaintiff gave the Defendant a note, addressed to his attorney, in which he requested that the proceedings might be stayed, as the Defendant had settled the debt and costs with the Plaintiff. The Defendant carried this to the attorney, who nevertheless proceeded to execute the writ of inquiry, and signed final judgment for 23*l*. 19*s*. 6*d*. damages and costs, which he levied.

Lens Serjt. shewed cause, contending that according to the case of *Swaine* v. *Senat*, 2 *New Rep*. 99., the attorney had a right to proceed, in order to secure his costs.

Best, *contrà*, observed, that there was nothing here injurious to the attorney, the Plaintiff having sworn, that if his attorney had applied to him, he was at all times

ready

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ready to pay him his costs. The proposal too for the compromise came from the Plaintiff.

The Court observed, that there seemed to be no fraud on the attorney in this case. The party had received the debt, and a guinea towards the costs. The attorney therefore should have proceeded no further.

Rule absolute.

July 1.

RYLAND v. NOAKES.

Upon the death of the attorney in the cause, notice must be given to the opposite party of the appointment of the new attorney, before he can proceed in the cause.

BEST Serjt. had obtained a rule *nisi* in this cause, for setting aside the judgment, and all subsequent proceedings, and for permitting the survivor of the bail to render the Defendant in discharge of his recognizance. One of three grounds on which he moved, was that the interlocutory judgment had been signed in 1805, by *B. Heywood*, then the Plaintiff's attorney, who soon afterwards died. No copy of a judge's order appointing another attorney was ever served upon the Defendant, but *Parrott*, calling himself the Plaintiff's attorney, had served upon the Defendant a notice of executing a writ of *fieri facias*.

Cockell Serjt., against the rule, contended that in the case of an attorney's dying, a judge's order for appointing another in his place was not necessary.

The Court, on referring to the officer, held, that it was necessary to give notice to the opposite party of the appointment of a new attorney, before any proceedings could be taken by him.

Rule absolute.

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PRICE v. SIMPSON.

July 2.

Under the conditions of pleading issuably and taking short notice of trial, if a declaration is delivered after the Sittings have begun, but so early that there would be time for notice of trial for the adjournment day upon the Defendant pleading *instanter*, that is, within 24 hours, he must so plead.

BEST Serjt. had obtained a rule *nisi* for setting aside an interlocutory judgment, which had been signed under the following circumstances. An attachment against the sheriff was set aside late in *Easter* term, upon the usual condition of pleading issuably, and taking short notice of trial for the Sittings after the term. The Plaintiff delivered his declaration on the 2d of *June*, which was the first day of the Sittings after the term, indorsed to plead *instanter*, accompanied with the demand of a plea. The Defendant supposed that he should satisfy the rule by pleading issuably, and paying money into court, within the four first days of the present term, since it was impossible that he should plead issuably in time for trial on the first day of the Sittings.

Shepherd Serjt. now shewed for cause, that if the Defendant had pleaded *instanter*, as he was required by the terms of the attachment, there would have been sufficient time for the Plaintiff to give short notice of trial for the adjournment day.

Best, *contrà*.

The Court held that the true sense of the rule was, that the Defendant should so plead, that the cause might come to trial at the Sittings after *Easter* term, and that he ought therefore to have pleaded *instanter*, since he would thereby have enabled the Plaintiff to proceed to trial at the adjournment day.

Rule discharged

July 2.

FENTON *v.* BOYLE and Others.

An inclosure act gave power to the commissioners to award in what townships the allotments should be assessed to the rates and taxes. They awarded that certain allotments which before were within the district of *H.* *were within* the township of *C.* Held that they did not thereby become rateable in *C.*

IN replevin for taking the Plaintiff's coals in a close called *Swift's Piece*, in the parish of *Rothwell*, two of the Defendants pleaded the general issue, *Boyle* the third, avowed under a warrant directing him, as constable, to levy 69*l.* 5*s.* 6*d.* for the Plaintiff's proportion of an assessment in respect of his lands and tenements which he occupied in the township of *Carlton*, made pursuant to an order of justices, under the stat. 13 *G.* 3. *c.* 78., upon the occupiers within that township. The Plaintiff pleaded that in the parish of *Rothwell* were five townships, of which *Carlton* was one, and a district called *Rothwell Haigh*, each of which had immemorially been separately assessed for the repairs of highways within its own limits, and not collectively or otherwise for the repairs of other highways not within its own limits, and, 1. that the place in which, &c. was parcel of *Rothwell Haigh*; 2. that the tenements in respect of which the Plaintiff was charged with 69*l.* 5*s.* 6*d.* were not situate in *Carlton*. The issues were upon these pleas. Upon the trial before *Chambre* J. at the last *York* Summer Assizes, a verdict was found for the Plaintiff, subject to a case, the material facts of which were, that in *Rothwell* were five townships, including *Carlton*, and a district called *Rothwell Haigh*, in which lay a waste called *Rothwell Haigh*. That an inclosure act of 25 *G.* 3. directed that the commissioners, after setting out roads over the destined inclosures, which were to be made and repaired for ever by Lord *Stourton* only, the lord of the soil of the waste, none of the inhabitants of the said townships being chargeable thereto, should allot 305 acres, in situations convenient for the respective townships, among the commoners, in satisfaction of their common rights; and

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and that, after deducting the highways, and 6 acres, to be set out as public gravel-pits, the residue of the waste should be allotted to Lord *Stourton*, whose right in the 305 acres, ecxept to the mines, should be thenceforth extinguished. And that for preventing disputes respecting the taxes and rates to be assessed upon the allotments, the commissioners, by their award, were to direct how many and what parts should be assessed to the rates and levies within each township, and the allotments were to be assessed to all taxes and assessments, within the townships, at the respective values that should be set thereon by the commissioners, but no part of the 305 acres was to be assessed along with any part of Lord *Stourton's* estate, that was formerly part of a certain park mentioned in the act. Then followed a reservation to Lord *Stourton* of all mines of lead ore, coal, and other minerals, under the 305 acres, and 6 acres. The commissioners by their award allotted the field in which, &c. to *John Swift*, and an allotment of 14 acres to the Plaintiff, and declared both of these to be "freehold *in the township of* Carlton," and each of the allotments of the 305 acres to *be in* some one of the five townships; they also by their award, assessed the Plaintiff, and *Swift*, and the several other owners, to the land tax for their respective allotments. The inhabitants of *Carlton* having pleaded guilty to an indictment for not repairing "a common "highway in the township of *Carlton*, not being a high-"way on any part of *Rothwell Haigh*," and a fine having been imposed and levied upon two of the Defendants, *Banks* and *Stocks*, amongst others, an order was afterwards duly made in a special sessions, by two justices, that an assessment upon the occupiers of lands and hereditaments within the township of *Carlton* should be made, and allowed according to 13 *G.* 3. *c.* 78. and collected, for reimbursing the persons on whom the fine had been levied. In the assessment made the Plaintiff

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was charged in the sum of 64*l.* 13*s.* 8*d.* in respect of his collieries, which he rented of Lord *Stourton*, being situate in and under *Swift's* allotment; and in the sum of 4*l.* 12*s.* 1*d.* in respect of the land he occupied, which was his own allotment. Upon his refusal to pay the first sum, the warrant mentioned in the plea issued.

Williams Serjt., in support of the verdict, which had been found for the Plaintiff on both issues, observed that The act had given the commissioners no power to award within what township the several allotments should locally be situated, but only with what townships, and in what proportions each allotment should be assessed, and this they had omitted to do. The collieries were neither locally situated in *Carlton*, nor liable to be assessed in *Carlton*. The act had itself decided this question, by especially providing that no part of the 305 acres should be taxed or assessed to or along with any part of Lord *Stourton's* estate.

Cockell Serjt. *contrà*, admitted that the two issues were found against him, but contended that by the benefit of the st. 13 *G.* 3. the Defendants might, under the general issue, avail themselves of the merits of their case, for they were legally right. The award that the allotments *were in* Carlton, must be construed as a direction by the commissioners that the owners should bear their proportions of public burthens in *Carlton*.

MANSFIELD C. J. The act directs them to say in what township the allotments shall be rateable. But they have not said in what township any of them shall be rateable.

Let the *Postea* be delivered to the Plaintiff.

HOGG v. SNAITH and Others.

A power of attorney to receive all salary and money, with all the principal's authority to recover, compound, and discharge, and to give releases, and appoint substitutes, does not authorize the attorney to negociate bills received in payment.

Nor to indorse them in his own name.

Nor does a power to transact all business.

Evidence of an usage at the navy office to pay bills indorsed by the attorney in his own name, and negotiated by him, under such a power, cannot be received to enlarge the operation of the power.

TROVER for two bills of exchange: upon the trial of this cause at the last Sittings at *Guildhall*, before *Mansfield* C. J. a verdict was taken for the Plaintiff, subject to the opinion of the Court upon the following case. The Plaintiff, by a power of attorney under seal, constituted *English* his attorney revocable, for him, in his name, and to his use, to ask, claim, demand, recover, and receive, from the commissioners of his majesty's navy, or whom else it might concern, all such salary, wages, &c. and all other money whatsoever, as then was or thereafter should be due to him for his service, or otherwise, in any of his majesty's ships; then followed a general power to receive all demands from all other persons whatsoever; the constituent giving and thereby granting unto his said attorney, his substitutes and assigns, all his authority and lawful power in the premises for receiving, recovering, obtaining, compounding, and discharging the same, as fully and effectually as he himself might or could do being personally present; and acquittances, releases, or any other discharges in his name to make, seal, and deliver, and one attorney or more to substitute, and at pleasure to revoke, with the usual clause of general ratification. By virtue of this power *English* received from the commissioners for victualling his majesty's navy, for the use and on the account of the Plaintiff, the two bills in question, which were made payable to the Plaintiff or his order. Upon each of these bills a clerk in the pay department of the victualling office had written his initials *G. S.* with the words "letter of attorney entered, *William C. English*, attorney," to denote that the power was lodged in the victualling office, and that the proper officer there recognized

English

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English as *Hogg's* attorney. *English*, without any other authority from the Plaintiff than this, being indebted to the Defendants, who were his bankers, in the sum of 142*l*. applied to them to discount these bills, which he delivered to them, indorsed " *W. C. English*, attorney." The Defendants discounted, and placed them to the credit of his account. Before the bills were due, the Plaintiff gave the Defendants notice that he had revoked the power of attorney made in favour of *English*, and that in case *English* or any other person should present to them both or either of the bills for discount, or security for money advanced, they should refuse them; he also demanded possession of the bills, which the Defendants refused to deliver up. The Defendants offered evidence that it was a general usage and practice for attornies, constituted by, and acting under similar powers, to negotiate bills of this description, by indorsing them in the like manner. The Plaintiff objected to the evidence; but *Mansfield* C. J. admitted it subject to the opinion of the Court. And it was proved, that powers of attorney lodged at the victualling office were not all in one and the same form, but that this particular power was in the form most commonly used for the last 18 or 19 years; before which time victualling bills were not made payable to order, but an assignment, or bill of sale, was necessary to transfer them: that the bills in question, thus indorsed, and thus marked by the clerk, would have been paid at the victualling office, either to *English*, or any other person who should have produced them with the same indorsement, but for the notice to stop the payment, which had been given by the Plaintiff. That it was the practice amongst navy agents, acting under similar powers of attorney, to raise money for the use of their principals, by indorsing similar bills in the same way, and delivering them to their bankers, who had continually advanced money upon them, and had received

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ceived the contents from the victualling office, without any other warrant or authority than such indorsement; and that bills so indorsed and marked, were frequently negociated; it being considered, that the mark recognizing the appointment of the attorney, and his indorsement, rendered them negociable. The questions for the opinion of the Court, were, first, Whether upon the whole evidence, considering it all as admissible, *English* had sufficient authority to indorse and discount the bills for his own use? and if the Court should be of opinion that he had, then, secondly, Whether the evidence objected to ought to have been received? and if the Court should be of opinion that it ought not, then, thirdly, Whether, rejecting the evidence of usuage, and considering the case apart from the facts found upon such evidence, *English* had sufficient authority to indorse and discount the bills for his own use?

Best Serjt., for the Plaintiff, contended that no authority was given to *English* by the power of attorney to discount or negociate these bills; and so far as his acts exceeded the scope of his authority, they were wholly void, and could not alter the Plaintiff's property in the bills. He observed, that the power of the attorney was limited to receiving these bills at the navy office; and it then became his duty to deliver them over to the Plaintiff; for by the course of the navy office, the delivery of the bills was payment of the debt due from the public to the Plaintiff. It would be too great a concession to allow that he could, even at the end of the ninety days, indorse them for the purpose of receiving the money on them for the Plaintiff's use. [*Lawrence* J. interposing, read a short note of the following case, as decisive of the first point. "*Hay, Executor* v. *Goldsmidt and Another, B. R.* " *Mich. term* 45 *Geo.* 3. This was an action brought " to recover the money which had been received by the

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" Defendants upon a bill of exchange, payable to the " Plaintiff's testator, Major-General *Patrick Duff*, or " his order, of which bill the Defendants had obtained " payment under a power of attorney granted by the " testator to *J.* and *R. Duff*, and authorizing them, for " him and in his name, to ask, demand, and receive from " the *East India* Company, or whom it should or might " concern, all money that might become due to him on " any account whatsoever, and to *transact all business*, " and upon non-payment or non delivery thereof, for " him and in his name to use all such lawful ways and " means for the recovery thereof as he might or could " do if he was personally present, and did the same; " and on payment or delivery thereof, for him and in " his name to make and give proper receipts or other " discharges for the same; and one or more substitute " and substitutes under them to appoint, and again at " pleasure to revoke, giving and thereby granting unto " his said attornies and their substitute and substitutes, " his full and whole power and authority in the pre- " mises; and concluding with the usual clause of ratifi- " cation. Under this power *J.* and *R. Duff* received an " *India* bill for 2920*l.* 8*s.* 10*d.*, payable to the testator " or his order, which each of them indorsed 'for Ma- " jor-General *Patrick Duff, per* procuration, *James Duff*, " *Robert Duff*.' They discounted the bill with the De- " fendants, and raised money on it. The Defendants, " by their broker, received of the *India* Company the " money due on the bill. At the trial a verdict was " found for the Plaintiffs; and *Erskine*, for the Defend- " ants, having obtained a rule *nisi* for setting aside the " verdict, and entering a nonsuit, the question for the " Court of King's Bench was, whether *J.* and *R. Duff* " had any authority to indorse and discount the bill?

26th of Nov. 1804.

" The present Attorney-General [*Gibbs*] and *Wilson* " shewed cause, and contended that the power of attor-

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" ney gave the *Duffs* authority to receive only, and not " to negociate the bill. *Erskine* and *Gaselee*, *contrà*, re- " lied on the words '*to transact all business*,' as giving an " authority to do more than merely to receive, and con- " tended that the indorsement was only a substitution of " other persons for the attornies themselves, which the " power enabled them to make. The cases of *Howard* " v. *Baillie*, 2 *H. Bl.* 618. and *Gardner* v. *Baillie*, 6 *Term* " *Rep.* 592. were referred to in the course of the argu- " ment.

" *The Court* was of opinion that the power to trans- " act business did not authorize the *Duffs* to indorse " the bill. The most large powers must be construed " with reference to the subject-matter. The words " '*all business*' must be confined to all business neces- " sary for the receipt of the money.

" Rule discharged."]

Best. 2. The evidence of the usage, if properly re- received in the principal case, does not distinguish it from that of *Hay* v. *Goldsmidt*. It was proved, indeed, that these bills, with this indorsement, would have been paid, except for the notice, and that navy agents are accustomed to raise money upon similar bills for the use of their principals. But here the money was not raised for the use of the principal, but for that of the attorney. But, 3. the evidence of the usage ought not to have been admitted at all. The practice of abuses, by what authority soever it may be countenanced, cannot be received to enlarge the operation of a definite written instrument.

Marshall Serjt., *contrà*, admitted that according to *Comb's* case, 9 *Co.* 75. the attorney could regularly do no act unless in the name of his principal. But it was proved, that these bills, indorsed in the name of the attorney, and not in that of the principal, would have

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been paid at the victualling office, when due. And this usage had now so long prevailed, that it induced bankers and others to advance money, to a large amount, upon this title. It was therefore such an universal practice of a trade, as to take the case out of the general rule of law. It is in every day's occurrence, that evidence is received of the usage of a particular trade to control the general law; and it was clearly right to receive such evidence in this instance.

Mansfield C. J. It certainly was proved at the trial, that navy and victualling bills, indorsed under a power like this, and so registered, currently pass from hand to hand like bank notes: but I was nevertheless of opinion that parol evidence could not be received to vary a written instrument. But if the evidence of the usage had been ten times as strong, it would not have authorized this transaction. The banker knew that these bills were not deposited with him for the debt of the Plaintiff, but for that of *English*. This is not at all distinguishable from the case mentioned by my Brother *Lawrence*; *English* could not possibly pay his own debt to *Snaith* with this money.

Heath J. concurred. This evidence ought not to be received to control the legal import of a known instrument in trade and commerce.

Lawrence J. was of the same opinion.

Chambre J. This authority is strictly confined to receiving the debt due to the Plaintiff from the commissioners of the navy. *English*, by receiving the bills, performed all that he was authorized to do. He ought afterwards to have kept them in his possession for the Plaintiff. However, even supposing that his power extended

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so far, that if he had kept the bills till they were due, he might have gone to the treasurer of the navy, and received the money, upon indorsing the bills, still this is clearly a deviation from that usage. But the evidence of the usage ought never to have been received for the purpose of altering the operation of a written instrument.

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Let the *Postea* be delivered to the Plaintiff.

BROWN v. WATTS.

July 4.

If a bill given in discharge of a debt is rendered inadmissible by being on an improper stamp, the Plaintiff may prove his original debt.

If a first particular be delivered under a judge's order, and the Plaintiff deliver a second particular without an order, he cannot give evidence upon any claim contained in the second particular, which was not included in the first.

It is a great contempt to deliver under an order a particular as general as the declaration.

THE Plaintiff declared on a promissory note, with the usual counts for money, and upon an account stated. Upon the trial, before *Mansfield* C. J. at the Sittings after last *Easter* term, the Plaintiff produced the Defendant's note for 5*l*. 6*s*. 6*d*.: but it was upon a wrong stamp, and therefore could not be read. The Plaintiff then proved a distinct admission of the original debt, made before the note was given. The Plaintiff had delivered, under a judge's order, a particular of his demand, which was a mere echo of the count upon the note, but contained nothing else. He afterwards, and after issue joined, delivered a second particular, without any order of a judge, in which he re-echoed all the counts of his declaration. *Best* Serjt., for the Defendant, objected to the admission of the evidence of the original debt, on two grounds. 1. That it appeared, that the Plaintiff had accepted in satisfaction of his debt, a bill, the contents of which were not proved; and, 2. that the Plaintiff, having in his first bill of particulars specified the note as his only demand, was precluded from recovering on any other cause of action; for that though the second bill of particulars would comprehend the original debt, yet as that had not been delivered under any authority of the Court,

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it did not supersede the first. Upon these objections *Mansfield* C. J.. nonsuited the Plaintiff, with liberty to move to enter a verdict.

Accordingly, *Manley* Serjt., having on a former day obtained a rule *nisi*,

Best Serjt. now shewed cause against it. He argued on the inconvenience that would arise, if Defendants, after having prepared their plea and their defence, to meet the case which the Plaintiff pointed out to them, were afterwards to be surprised with a new bill of particulars comprehending many more grounds of demand. On the other point, he compared this to the case of a written contract for building a house, or executing any other work, where, if an improper stamp renders the contract inadmissible, the contractor's obligation cannot be shewn by parol.

Manley, contrà. In that case the obligation is created by the inadmissible instrument, and therefore cannot be proved by other means. Here was a pre-existing debt; the written instrument was a subsequent transaction. In a recent case, *Stewart* v. *Mason, B. R.*, tried before Lord *Ellenborough* C. J., at the Sittings at *Westminster*, 1 *June* 1808, the declaration consisted of the usual counts for money. A bill which had been given in payment, was produced, for the purpose of shewing, that it was on an insufficient stamp, in order that the original debt might be set up. As to the other point, if the second particular was sufficiently circumstantial in stating the nature of the cause of action, since the Defendant, by not objecting when he received it, had admitted its validity, the Court would not now reject it. The second particular mentioned an account stated, by which the Defendant's attention would be directed to answer the evidence of the admission.

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The Court agreed that it was competent to give parole evidence of the original debt. If the Plaintiff had made it his principal case at trial to prove the original debt, and had left the Defendant to set up the note as his defence, the note, being inadmissible, would have been no answer to the case; and it must be immaterial, in which shape the case was first brought forward. But they severely animadverted on the too frequent practice of delivering particulars which were so general, as to convey no further information to the parties than they could gain from the declaration itself, and termed it a contempt of the orders of the Court, and a means of burthening the parties with an increase of costs; and considering that the Defendant was not bound by the second particular to prepare his defence against any demand which was shut out by the first, they

Discharged the rule.

CAREW, Vouchee.

July 4.

In a recovery suffered of manors, the Court permitted an amendment by the insertion of messuages originally parcel of the manor, but severed by a settlement, and omitted to be named in the recovery; the vouchee, being tenant in tail, still alive, and the messuages intended to pass.

SHEPHERD Serjt. moved to amend a common recovery, suffered of certain manors in *Devon*, by inserting certain messuages. The recovery was suffered with an intenttion to pass all the estates of inheritance of Mr. *Carew* in the county of *Devon*. The deed to make the tenant to the *precipe* had the words "all other the messuages, lands, tenements, and hereditaments, whereof "or whereto the said —— *Carew* was entitled to any "estate of freehold of inheritance in the county of *Devon*." Certain messuages were originally parcel of the manors in that deed and in the recovery named, but by a private act of parliament, passed in 1751, for the purpose of a settlement, they were separated from the manors,

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CAREW, Vouchee.

nors, and will not now pass as parcel, although Mr. *Carew* is entitled to them.

The Court inquired whether his affidavit stated that Mr. *Carew* was still alive, and that he was seised in fee-tail of the messuages in question, and that these premises were intended to pass by the recovery; and upon being satisfied as to these points, permitted the amendment.

July 4.

DOE, on Demise of JOHNSTON, *v.* PHILLIPS.

No memorial is necessary to be enrolled of an annuity granted in consideration of the grantee resigning her trade and leasehold premises to the grantor.

Though part of the consideration was book-debts, and stock in trade.

THIS was an ejectment, brought to recover possession of two messuages in *Middlesex*. Upon the trial before *Mansfield* C. J. at the Sittings after last *Hilary* term, it appeared that the lessor of the Plaintiff, being possessed of the premises for the unexpired residue of a term of 32 years, assigned to her son, by deed, her trade of a smith, and stock, and the book-debts amounting to 380*l*. specified in a schedule, and these premises, subject to the payment of an annuity of 31*l*. 4*s*. *per ann.* to herself for life; upon the non-payment of which she now sought to re-enter. No memorial of this deed had been enrolled, according to the directions of 17 *G*. 3. *c*. 26. A verdict was found for the Plaintiff, with liberty for the Defendant to move to enter a nonsuit, upon the ground that a memorial was necessary.

Accordingly *Vaughan* Serjt. having, on a former day, obtained a rule *nisi*, was now called upon by the Court to support his rule. He endeavoured to distinguish this from the cases of *Crespigny* v. *Wittenoom*, 4 *Term Rep.* 790. and *Hutton* v. *Lewis*, 5 *Term Rep.* 639. This deed purports to be made in consideration of natural love and affection;

affection; but it is not made in consideration of natural love and affection only, nor is it a mere assignment of a business; but it is also an assignment of a sum of money, the book-debts. That then is a pecuniary consideration, which was not an ingredient in either of the other cases. If it is necessary that an annuity, in order to come within that act, must be granted in consideration of money only, it would in all cases be easy to evade it, by mingling some business, or other matter, with the consideration. This case is not distinguishable from that of *Crosley* v. *Arkwright*, 2 *Term Rep.* 603., where the consideration was a debt of 460*l.*, 20*l.* in money, the stock and effects on a farm, and the possession of the farm.

MANSFIELD C. J. To bring an annuity within the act, the consideration must be money only; but the act would embrace a case of fraudulent evasion.

CHAMBRE J. In the case of *Crossley* v. *Arkwright* the consideration wholly consisted of money and goods; and goods most strongly belong to the class of annuities that requires registration. This is quite a different kind of transaction.

Rule discharged.

BANNISTER *v.* FISHER.

July 6.

If one count state an assault on a man, and an assault on the horse which he is riding, and the jury give a verdict with general damages under 40*s.* the Plaintiff shall have no more costs than damages.

WILLIAMS Serjt. had, on a former day, upon the authority of *Clarke* v. *Othery*, 1 *Str.* 6 4. obtained a rule *nisi* that the *postea* in this case might be amended, by substituting 5*s.* costs, instead of 40*s.* costs, and

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and that the prothonotary might review his taxation of increased costs. This action was tried at the last *Exeter* Assizes, before *Thompson* B. The first count of the declaration charged, that the Defendant assaulted the Plaintiff, and with a certain stick struck him many blows, whereby he became sick, &c., and then and there with the said stick struck a certain horse, on which the Plaintiff was riding, many blows, whereby the horse was greatly injured. There was evidence that several heavy blows were given to the horse. The jury found a general vercict for the Plaintiff, with 5*s*. damages. The Judge did not certify under the statute of *Eliz*. The associate indorsed the *postea* for 40*s*. costs, upon which the prothonotary had taxed for the Plaintiff his full costs of the action.

Lens Serjt. now shewed cause. He urged that this was a distinct independent assault on the horse; for the horse was beaten after the man had been pulled to the ground, as would appear by the Judge's report, if refered to.

The Court refused permission to the Plaintiff to apply for the Judge's report, and held that they could look only at the declaration; upon which it did not appear that there was a distinct assault upon the horse; the assault there laid, was an assault of the man riding upon the horse, and an assault of the horse. The Defendant could not assault the horse while the man was on it, without assaulting the man. It therefore must be taken that the whole, being included in one count, was only one transaction. The jury ought to have distinguished by their verdict whether the assault were committed on the man or on the horse.

Rule absolute.

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SNOWDON v. DAVIS.

July 6.

The action for money had and received lies to recover back money which has been obtained through compulsion, under colour of process, by an excess of authority, although it has been paid over.

To make it a defence to an agent that he has paid over the money, it is necessary that the money should have been paid to the agent expressly for the use of the person to whom he has so paid it over.

A sheriff issued a warrant on mesne process to distrain the goods of *A.*; the bailiff levied the debt upon the goods of *B.*; and paid it over. Held that money had and received will lie against the bailiff.

THIS was an action for money had and received, &c. Upon the trial at the last *Reading* Spring Assizes, before *Chambre J.* it appeared, that on the 12th of *February* 1806 a writ of *distringas* had issued out of the Court of Exchequer, directed to the Sheriff of *Berks*, requiring him to distrain the inhabitants of the Borough of *New Windsor* by their lands and chattels, and to answer the issues of such lands, so that they should appear to render an account as in the annexed schedule mentioned. The schedule referred to was in substance, "Upon the inhabitants of the borough of *New Windsor*, for the deficiency of *George Dixon* and *John Snow*, collectors in the said borough, the several sums of 7*l.* 8*s.* 2*d.* and 74*l.* 2*s.*" By virtue of this writ, the sheriff issued a warrant to the Defendant, commanding him to distrain the inhabitants of *New Windsor* for the insufficiency of *Dixon* and *Snow*, the sums of 7*l.* 8*s.* 2*d.* and 74*l.* 2*s.* The Defendant, under colour of the warrant, demanded of the Plaintiff, who was an inhabitant of the borough of *New Windsor*, the two several sums of 7*l.* 8*s.* 2*d.* and 74*l.* 2*s.*: the Plaintiff at first refused to pay the money, but upon a subsequent demand made, he paid it, upon which the Defendant gave him a receipt for so much money by him distrained under his majesty's writ for that purpose issued against the inhabitants of *New Windsor*. On the 12th of *February* 1806 another writ of *distringas* issued to the Sheriff of *Berks*, commanding him to distrain the several persons, collectors, in the schedule thereto annexed named, by all their lands and chattels, and to answer the issues of such lands, so that they should appear to render an account as in the said schedule mentioned. The schedule was, "Upon the borough of *New*

"*Windsor*,

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"*Windsor, G. Dixon* and *J. Snow* collectors, the sum of "132*l.* 14*s.* 7*d.*" Upon this writ the sheriff issued his warrant to the Defendant, to distrain upon *Snow* and *Dixon*, the collectors there, the sum of 132*l.* 14*s.* 7*d.*, upon which warrant the Defendant demanded of the Plaintiff that sum, and also the sum of 6*l.* 12*s.* 5*d.* for issues. The Plaintiff at first refused to pay him, but the Defendant took possession of his goods; upon which the Plaintiff paid him both sums, and the Defendant gave him a receipt for the money, as received under his majesty's writ of *distringas* for arrears of taxes, and one shilling in the pound issues, viz. *distringas* 132l. 14*s.* 7*d.*, issues 6*l.* 12*s.* 5*d.* The Defendant proved, that before the time of bringing this action, the sums levied by colour of the first writ had been paid over by himself to the sheriff, and by the sheriff into the exchequer, and that the sheriff had received his *quietus*. He also proved that the sums levied under colour of the last writ had been paid over by himself to the under-sheriff before the action brought. *Chambre* J. directed the jury, that the Plaintiff was entitled to recover the sums he had so paid, deducting the issues upon the sums mentioned in the first writ, which issues the Defendant was, by the practice of the Court of Exchequer, authorized to levy. The jury found a verdict for the Plaintiff for 216*l.* 13*s.* 10*d.*, being the amount of the several sums of money so paid by the Plaintiff, deducting thereout 4*l.* 1*s.* 6*d.* for the issues of 1*s.* in the pound on the amount received under first writ.

Williams Serjt. had in the last term obtained a rule *nisi* that the verdict might be set aside, and a nonsuit entered, upon the ground that as the money had been paid over by the bailiff to his principal, the action for money had and received could not be supported against the bailiff.

Shepherd

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Shepherd Serjt., on a former day in this term, shewed cause against this rule. This is not the case of an agent actually authorized, for the bailiff has wholly deserted the line of his authority. Upon the first writ the sheriff had given him an authority to receive only the issues of 1*s*. in the pound on the lands, and the bailiff levies the whole amount of 81*l*. Upon the second writ the sheriff commands the Defendant to distrain upon the collectors, and he levies the debt upon the goods of the inhabitants. If the bailiff, who being authorized to seize the goods of *A*., takes the goods of *B*., ceases to be liable because he has paid over the proceeds to his principal, the Plaintiff would be without remedy; for no action could lie in this case against the sheriff. *Drake* v. *Sykes*, 7 *Term Rep*. 113. where it was held that to make the principal liable, it was necessary to prove a warrant from the sheriff to the bailiff, authorizing the act complained of. [*Lawrence* J. interposing, observed that it had been otherwise determined in the case of *Saunderson* v. *Baker*, 3 *Wils*. 309.; where it was held, that if a sheriff make a warrant to his bailiff to take the goods of *A*., and he take the goods of *B*., an action well lies against the sheriff.] He would be deprived of this remedy on another account; for the sheriff having paid over the money into the exchequer, the sheriff also must be regarded as an agent, and could not be sued for money had and received. This is a compulsory payment. But neither in the case of *Sadler* v. *Evans*, 4 *Burr*. 1986., nor in that of *Pond* v. *Underwood*, 2 *Ld. Ray*. 1210., nor in that of *Greenway* v. *Hurd*, 4 *Term Rep*. 553., was the payment made through any compulsion. Lord *Mansfield* C. J., in the first of those cases, cautiously kept clear of all payments to third persons, except those which are made to known agents, in which case, the action, he said, ought to be brought against the principal, unless in special cases, (as under notice, or *malâ fide*.) Perhaps this might be considered

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sidered as a case of the last class; it was true that the officer had paid over to the sheriff; but the sheriff did not know under what circumstances the officer had received it, nor whether the Plaintiff had paid it voluntarily, or otherwise. And the Plaintiff had not led the bailiff into any error by voluntarily paying it, but he resisted the demand until compelled to pay.

Williams, in support of his rule, admitted that the Defendant received all the money in the first instance without any authority; but as he had paid over both sums to his principal, the sheriff, by receiving the money, had recognized him as his agent for that purpose; and where an agent has paid over the money to his principal, it is clear, according to all the cases, that this action cannot be maintained against the agent, but must be brought against the principal. He denied the distinction which *Shepherd* had drawn between voluntary and compulsory payments: Lord *Mansfield* in *Sadler* v. *Evans*, had made no such distinction. The case of *Greenway* v. *Hurd* precisely coincided in circumstances with this. In both, the Plaintiff had at first refused to pay, and had afterwards paid under the terrors of a penalty.

Cur. adv. vult.

MANSFIELD C. J. on this day delivered the judgment of the Court.

The facts of the case are short and few. A writ of *distringas* issued out of the exchequer to the sheriff of *Berks*, to levy issues on the inhabitants of *New Windsor*. The sheriff made his warrant, following the words of the *distringas*, and authorizing the Defendant, his bailiff, to levy these issues. The *distringas* did not order the sheriff, nor did the sheriff order his bailiff, to levy the greater sums of 7*l.* 8*s.* 2*d.* and 74*l.* 2*s.* The bailiff threatens

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threatens *Snowden* to distrain his goods for these two sums. For a part of them, namely, for the issues, he had, for the residue, he had not, a right to distrain. The Plaintiff, under the terror of a distress, pays both these sums. The bailiff pays the money over to the sheriff, and the sheriff to the exchequer, and it is objected, that as it has been paid over, the action for money had and received does not lie against the bailiff; and this is compared to the case of an agent, and the authorities are cited, of *Sadler* v. *Evans, Campbell* v. *Hall*, 1 *Cowp.* 204., *Buller* v. *Harrison*, 2 *Cowp.* 565., and several others. In the case of *Sadler* v. *Evans*, the money was paid to the agent, of Lady *Windsor* for Lady *Windsor's* use: in that of *Buller* v. *Harrison*, the money was paid to the broker, expressly for the benefit of the assured. In *Pond* v. *Underwood*, the money was paid for the use of the administrator. Can it in this case be said with any propriety, that the money was paid to the bailiff for the purpose of paying it to the sheriff, or to the intent that the sheriff might pay it into the exchequer? The Plaintiff pays it under the terror of process, to redeem his goods, not with an intent that it should be delivered over to any one in particular. To make the argument the more curious, if it had happened that the Plaintiff had looked at the warrant, he could not have paid the money with a view that it should be paid over to the sheriff; for he would there have seen an authority to levy 4*l.* 1*s.* 6*d.* only. He clearly then paid the money under the terror of a distress. With respect to the other writ, the circumstances are the same. Under the like terrors of a distress, he pays the second sum. The warrant was, to levy upon the goods of the collectors, not upon those of the inhabitants of *New Windsor*. The Plaintiff pays that sum also to the bailiff, the bailiff having no authority whatsoever to receive it. The action for money

had

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had and received very well lies under the circumstances of this case, which in no respect resembles the cases cited, and the rule for a nonsuit must therefore be

Discharged.

July 6.

CROSBY v. PERCY.

If upon fair, serious, diligent inquiry without evasion, an attesting witness is not to be found, evidence of his hand-writing is admissible to prove the attestation.

If on inquiry for an attesting witness, it appears that he has absconded to avoid his creditors, the secondary evidence is admissible.

Semb. that circumstances corroborative of the genuineness of the transaction, may render a slighter search sufficient, than would be required under circumstances of suspicion.

Evidence that the attesting witness to an intermediate assignment of a lease had absconded from his creditors, was held sufficient to let in proof of his hand writing, the possession having accompanied the subsequent assignment, and no slur being cast on the title.

ASSUMPSIT for not completing a purchase of the lease and fixtures of a public house. Upon the trial before *Mansfield* C. J. at *Guildhall*, at the Sittings after last *Hilary* term, the Plaintiff, being required to establish his title to the lease bargained for, duly proved the execution of the original lease, and two mesne assignments. Two intermediate assignments were attested by *George Barnett:* the possession of the premises had accompanied the lease and the several assignments, from the commencement of the term to the time of the trial. The Plaintiff's attorney swore he had made inquiry for *George Barnett* at his usual place of abode, and could not find him, but that he had been informed, as well there, as by his father, in answer to his inquiry for the son, that he had absconded to avoid his creditors, and was not to be found. Upon this evidence *Mansfield* C. J. permitted the hand-writing of the witness to be proved, and a verdict was found for the Plaintiff.

Best Serjt. had in the last term obtained a rule *nisi* for setting aside the verdict and entering a nonsuit, on the ground that the absence of the witness had not been suf-

ficiently

ficiently accounted for, to render this secondary evidence admissible.

Shepherd Serjt., on a former day in this term shewed cause against this rule. He observed that in the case of *Cunliffe* v. *Sefton*, 2 *East*, 183. slighter evidence of search for the attesting witness had been held sufficient. He also relied on this, that in the present case no suspicious circumstances existed. Such would induce the Court to insist more strictly on all possible search being made for a witness.

Best, contrà. This evidence would have been sufficient to support an application to postpone the trial, but was not sufficient to let in the secondary evidence. A subscribing witness can never be dispensed with, unless it clearly appears that is impossible he can be had. The cases of *Barnes* v. *Trompowsky*, 7 *Term Rep.* 266. and *Prince* v. *Blackburn*, 2 *East*, 250. prove, that the old rule is not at all relaxed; and the case of *Cunliffe* v. *Sefton* is distinguishable from this; for there the Court seemed to think that there was no probability that the attesting witness could be found by any continuance of the search. Here the Plaintiff knew the witness, and his usual abode. His absence was only temporary. His embarrassments might not continue for ever: he might retrieve his circumstances and pay his debts, or he might compound with his creditors, or be discharged under an insolvent act.

Cur. adv. vult.

MANSFIELD C. J. on this day delivered the opinion of the Court.

After adverting to the facts of the case,—Upon the authority of late cases it seems that there was sufficient room to receive this evidence. It is very difficult to lay

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down as a general rule what shall be deemed a sufficient inquiry for an attesting witness, before proof of his hand-writing shall be let in. But in this case the proof of the assignment was mere matter of form; the assignment was little better than waste paper; for the Plaintiff was in possession of the premises, and no slur was thrown on his title at the trial. From the nature of the business, it was very improbable that the attesting witness, if he had been produced, would have known any thing of the transaction. But the Defendant puts it (*a*) on the Plaintiff to prove his legal title, and he seeks about to find the attesting witnesses. It does not well occur to me what more he could do, unless to advertise publicly for the man; and if he had done that, the question might be raised, what was a sufficient advertisement. The witness probably evaded all eyes, and perhaps had changed his name. In all cases it must appear to the Court that there was a fair, serious, and diligent inquiry, and no evasion, or attempt to keep the witness out of the way. And upon that ground the evidence in this case was properly admitted. The law has been much relaxed in this particular within the period of my practice. The increased commerce of the country, and the number of the persons who every year go out of it, first rendered it necessary to admit secondary evidence in the case of witnesses's being abroad: the dispensation was next extended to the case of witnesses who were not to be found; and according to the last decision of *Cunliffe* v. *Sefton*, the present case comes within the rule. The balance of convenience is in favour of this extension;

(*a*) At the trial the Defendant contended that the proof of the last assignment, alone was sufficient to establish his title, and cited the case of *Nash* v. *Turner*, 1 *Esp.* 216. MANSFIELD C. J. thought the case not in point. He held that the Plaintiff must prove his title through all the mesne assignment.

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more inconvenience results from excluding the secondary evidence than from admitting it. While the Plaintiff, for instance, was waiting for the re-appearance of this person, all his other witnesses might die.

Rule discharged.

DOE, on the Demise of HENRY LEICESTER Esq. and Ann his Wife, and Others, *v.* BIGGS.

July 6.

Where a feme covert has for many years been separated from her husband, and during that time has received for her separate use the rents of her own property, which accrued to her by devise after the separation, she shall be presumed to receive the rents and acknowledge the tenancy, by her husband's authority.

THIS was an ejectment, tried before *Mansfield* C. J. at *Westminster*, at the first Sittings in this term. The title of the lessor of the Plaintiff arose under a devise of the premises to *Moore* and *Skinner* and their executors, in trust after the decease of the testator's wife, to pay unto, or else permit his niece *Ann Cole* to receive the rents during her life. *Ann Cole*, after the devise, married Mr. *Leicester*, and separated from him during the lifetime of the testator's widow: no deed of settlement made upon the separation was produced, but a witness proved that he had received the rents of the premises for Mrs. *Leicester*, and paid them over to *her*; he had never received them for Mr. *Leicester*: three receipts were produced, in which the same witness acknowledged his having received the rents for the use of Mrs. *Leicester*. *Shepherd* Serjt., for the Defendant, contended, that there was sufficient ground to presume that Mrs. *Leicester* had accepted the rent by the authority of her husband, and that a tenancy under him being therefore proved, it must be shewn that he had given the Defendant notice to quit, of which no evidence was offered. *Mansfield* C. J. reserved the point, and subject thereto a verdict was found for the Plaintiff.

Accordingly, *Shepherd*, having on a former day obtained a rule *nisi* to enter a nonsuit,

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Doe dem. Leicester v. Biggs.

Manley Serjt. shewed cause, upon the authority of *Tracy* v. *Dutton*, *Palm.* 206. S. C. *Cro. Jac.* 617, where it was resolved, that if a tenant, even not having notice of the coverture, pay to the wife after marriage the rents reserved upon a lease made by the wife while sole, he shall pay them again to the husband.

Mansfield C. J. There could be no doubt but that in this case the husband had given his wife a general authority to demise the premises, and receive the rents. He never himself received them; she had separated from him many years. Certainly, if the Plaintiff had insisted on it at the trial, I should have been obliged to leave it to the consideration of the jury, whether the husband had given such an authority, but they could not have hesitated a moment to presume it. Every one who heard the evidence plainly understood it so.

Rule absolute for a nonsuit.

END OF TRINITY TERM.

CASES



ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Michaelmas Term,

In the Forty-ninth Year of the Reign of GEORGE III.

SAUNDERS *v.* WRIGHT.

Nov. 7.

Where an annuity is secured upon land expressed to be of equal or greater annual value, before the Court will set aside, upon the inferiority of the value of the land, a warrant of attorney given as a collateral security, for the want of a memorial, they will direct an issue, to try whether the land be of less annual value, and will not try that matter upon affidavits. Especially if there be conflicting evidence of the value of the lands.

SHEPHERD Serjt. had in *Easter* term last obtained on the behalf of the assignees of the Defendant, a bankrupt, who in 1806 had granted to the Plaintiff an annuity of 300*l.* a-year, secured upon freehold houses in *Aldgate*, supposed to be of equal or greater annual value, a rule *nisi*, to set aside, for want of a memorial, the warrant of attorney which had been given as a collateral security. He moved this upon an affidavit which stated, that the deponent had in 1803 sold to the Defendant the premises, which were freehold, for 2500*l.*, and that 50*l.* had not been since expended in improving

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the property. Three surveyors also made affidavits, asserting that the annual value of the premises did not exceed 230*l.* The deed of grant recited that since the purchase for 2500*l.* considerable sums had been expended in improving the premises.

Lens, Vaughan, and *Pell,* Serjts., in *Trinity* term last shewed cause against this rule, upon an affidavit that the application to the Plaintiff to purchase the annuity, had originated with the Defendant, who spontaneously represented the premises to be of the yearly value of 400*l.* at least, and that being required to give some proof of their value, he produced the certificate of a surveyor named *Burton*, "that the premises would readily let for 330*l.*, "and that he saw no objection to asking 400*l.* for them," and upon this document the Plaintiff agreed for the purchase of the annuity, and considering a memorial as unnecessary, omitted to enrol any. *Burton* and another surveyor also made affidavits, in which they estimated the annual value of the premises at 320*l.* and 330*l.* The counsel for the Plaintiff contended that as the Defendant had himself voluntarily applied for the purchase of the annuity, and had represented the premises to be of superior value, he could not now be permitted to take advantage of his own deception, if he had practised any, and to defeat his grant because the premises were less valuable than he had represented; and the assignees could not stand in a better situation than the bankrupt himself. But where there was conflicting evidence of the value, and no intention of fraud or evasion appeared on the part of the grantee, who probably did not dare to enrol a memorial, because he might well think it would be an admission that this was a personal annuity, which it was never intended to be: in such a case, the Court would not decide the question upon affidavits, but would direct an issue to try the value.

Shepherd

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Shepherd, Williams, and *Best,* Serjts. *contrà,* insisted on the smallness of the price for which the premises were sold in 1803, as a proof that they could not be worth 300*l.* a-year in 1806. Perhaps the Court would not interfere on account of a minute difference in the opinion of the surveyors, but the premises had been estimated at 70*l.* *per annum* more than they were worth; the balance of testimony was, they said, strongly against the sufficiency of the premises.

The Court directed an issue, in which the grantee of the annuity should be Plaintiff, upon the question whether the premises at the time of granting the annuity were of equal or greater annual value than 300*l.* a-year; the rule in the mean time to be enlarged until the next term, with a stay of proceedings.

The Plaintiff in the issue, upon the trial, at the Sittings after *Trinity* term last, at *Guildhall,* before *Mansfield* C. J. obtained a verdict establishing the sufficiency of the premises, upon which the Court, on this day,

Discharged the rule.

1808.

Nov. 3.

COOK v. TOWER.
CHEEK v. TOWER.

An annuity was granted in consideration of a debt before secured by bond. The grantee's refusal to deliver up the bond neither makes the consideration to be falsely described,

Nor is such a keeping back of part of the consideration, as to vacate the annuity.

An annuity was granted in consideration of a bill accepted, which was dishonoured by the acceptor, but paid by the drawer on notice; held that this was not such a non-payment of the bill, as to vacate the annuity.

Though the bill was accepted for the accommodation of the drawer, who undertook to furnish assets for payment, and neglected to do so.

It is discretionary with the Court whether they will give relief under the 4th section of 17 *Geo.* 3. *c.* 26.

MANLEY Serjt. had in the last term obtained rules *nisi* that the judgments signed in these cases under warrants of attorney might be set aside, and that the deeds and securities given by the Defendant to secure two several annuities of 65*l.* and 26*l.* might be delivered up to be cancelled, or that *Cook*, the grantee of the larger annuity, might deliver up to be cancelled a joint bond of the Defendant and the Plaintiff *Cheek*, which had been given to him, conditioned for the payment of 500*l.* and interest. The circumstances of the transaction were these: the Defendant being desirous instantly to raise money upon annuity, the Plaintiff *Cheek* found a client, *Cook*, who advanced 500*l.*, as the price of an annuity of 65*l.*: and until the annuity deeds could be prepared, he accepted as a security the joint bond of the Defendant and the Plaintiff *Cheek*, to be cancelled when the annuity deeds were executed, and their warrant of attorney to confess a judgment. To indemnify *Cheek* against which, the Defendant executed a counter bond and warrant of attorney to confess judgment for 1000*l.* The Plaintiff *Cheek* afterwards gave the Defendant a bill drawn by himself on, and accepted by, his agent *Bowsfield* for 199*l.*, as the consideration for an annuity of 26*l.* It was suggested, and not denied, that this was an accommodation bill, and the drawer having omitted to provide funds for payment, it was dishonoured, but he paid the bill upon notice, and within four days after it first became due. A deed was prepared and executed, in which the Defendant granted *Cook* a

redeem

redeemable life annuity of 65*l*. *Cook* objected to receive this deed, declaring that he had never agreed for the purchase of a redeemable annuity, and required that the deed should be altered, and the annuity made absolute for at least 7 years: upon the Defendant's refusal, *Cook* informed him that he should still hold him and the Plaintiff *Cheek* liable on the bond, which he refused to deliver up; however, he afterwards made the arrears of the annuity the consideration for a further annuity granted by the Defendant. In the same deed was contained the grant of an annuity of 26*l*. to *Nicholas Mosely Cheek*, to whom the sum of 199*l*. belonged; and the two annuities were included in the same memorial. The Defendant gave his bond, and a warrant of attorney in 1000*l*., to the Plaintiff *Cook*, and the like security in 400*l*. to the Plaintiff *Cheek*, who had become surety with the Defendant, for the payment of the annuity of 26*l*. to *Nicholas Mosely Cheek*. The bond and memorial given to *Cook* recited the former bond for 500*l*., and that the money was still due and owing, and that this debt was the consideration for the annuity of 65*l*.

Manley objected, 1. That inasmuch as the bond given to *Cook* was not delivered up to the Plaintiff at the time of executing the deeds, the consideration agreed on for the annuity of 65*l*. had not been given. 2. That as the bill for 199*l*. was not paid when due, the Court were bound to vacate the annuity of 26*l*.

Vaughan Serjt. now shewed cause against this rule. The detention of the bond is no ground for setting aside the first annuity: nor does it vitiate the memorial. If *Cook* acted improperly in retaining it, the Defendant might have brought trover. As to the 2d annuity, the act ought to receive a liberal construction, and although the bill was not paid on the day when it became due, yet it is not shewn that the omission happened with the privity

and

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and consent of the grantee *Nicholas Cheek*, whose money was the consideration for the annuity, and against whom this application is made to set it aside: the Defendant in his affidavit admits that the Plaintiff *Cheek* paid the bill upon the first intimation of its dishonour, with an apology for his neglect. The bill too was accepted by *Bowsfield*, so that there subsisted the obligation of another person for the payment. If a note of the Bank of *England* had been the consideration given, and the Bank had refused to pay it upon a groundless suspicion of forgery, that would not have been sufficient to vacate the annuity. No application was made to the grantee in consequence of the non-payment. The act must receive a liberal construction.

Shepherd and *Manley*, Serjts., in support of the rule. The act must be construed strictly, for the benefit of the grantors of annuities. The intention of the st. 17 *G*. 3. *c*. 26. *s*. 4. was, to provide that grantors should have no trouble in receiving the consideration money. And where a bill is dishonoured through the neglect of the drawer to furnish funds for payment, it fails to be paid with his privity and consent. The Plaintiff *Cheek* clearly was the person advancing the money, and if the memorial had described *Nicholas Cheek* as the person who advanced the money, it would have been bad, for it has been repeatedly decided, that the very hand that pays it, must be named. Upon the construction contended for, the annuity would stand good, even if the grantee's agent, without his knowledge, had prevented the bill from ever being paid at all. This 4th clause is even stricter than either of the others: it is not to be construed as giving the Court a discretionary power to interfere, but is imperative that they shall set aside the deeds, the stat. 8 & 9 *W*. 3. *c*. 11. *s*. 8. for suggesting breaches in actions on bonds, has at length received a similar

similar construction, though it was long held that Plaintiffs had a discretion. If it is not required that the bill shall be paid at the day, the Court can fix no subsequent period at which it shall be paid; the act has not said that if the bill is ultimately paid, the annuity shall stand. As to the greater annuity, since the defect last mentioned is declared to avoid the *deed*, and both annuities are granted by the same deed, both must fall together. But if not, the bond, which was at least a part of the consideration, never was received by the Defendant; and therefore either the consideration is falsely described, or a part of it has been kept back.

MANSFIELD C. J. This is an application to the Court to set aside the assurances given to secure an annuity, founded on the act 17 *Geo.* 3. *c.* 26., which gives the Court this new and especial authority to set aside such securities. The act has been very liberally construed on the one side. But we ought to put upon it neither too rigid, nor too liberal, but a rational construction. It would be a desperate measure to cancel the deed, and put an end to the securities upon which two annuities depend, because one of them was bad, though the other was good. One evil designed to be remedied by the act, was, that grantors, for the sake of obtaining immediately some part of the money, would accept a large part of the price in bad bills, drawn by one insolvent person upon another insolvent, or by one dishonest man upon another equally dishonest. The 4th section of the act gives relief, if any of the bills, with the privity and consent of the person drawing them, shall not be paid when due, or shall be cancelled without being paid, or if the consideration, or any part of it, is paid in goods, or if any part of the consideration is retained under pretence of answering the future payments of the annuity, or any other pretence. The rest of these expedients are,

every

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every one, a manifest fraud upon the grantor: but the non payment of the bills may happen either without fraud, or with fraud. The statute proceeds to enact that if, upon application, it shall appear to the Court, that such *practices* have been used, the Court may order the securities to be cancelled. It is difficult not to suppose that the legislature, in using this expression, had in view something fraudulent, and that the law was meant to punish something dishonest and base. In this case, *G. Cheek*, acting for *N. Cheek*, agrees to advance 199*l.*, provided the Defendant will take a bill accepted by *Bowsfield*. Much has been said of its being an accommodation bill: but that makes no difference as to *Bowsfield*, because he was liable on his acceptance. The drawer pays the bill as soon as he possibly could, after notice of the non-payment by *Bowsfield*. Can it then be said, that within the meaning of the act, the bill was not paid when due? The intention of the act was to protect grantors from receiving paper worth nothing: here the party receives the money as soon as he could demand it of the drawer. Privity and consent must in such a case as this mean some contrivance that the bill should not be paid. It would have been a very harsh measure, if the Defendant, resting on the acceptor's refusal, had vacated the annuity as soon as payment of the bill was refused; but that has not been done here: he resorts to the drawer, and actually receives the money. It is impossible to say this bill was not paid. As to the other annuity, the bond was extinguished by the annuity deed, and was no longer of any effect or value. *Cook* was either ignorant, or dishonest, in saying that he still had a demand on the bond: if he had taken advice, he would have learnt that the bond was a nullity.

LAWRENCE J. I am of the same opinion. As to the annuity of 65*l.* unquestionably the consideration of it was

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was the debt of 500*l.*; and when the annuity deeds were executed, *Cook* could no longer recover on the bond. As to the last annuity, I cannot think that this bill was not paid when it became due, according to the meaning of the act. The nature of a bill of a bill of exchange is, that it is an engagement of the drawer, and an engagement of the acceptor; and if, upon the failure of the acceptor, the drawer pays it, I think it is paid by the drawer when due. The Defendant has received the whole consideration for his annuity.

CHAMBRE J. I entirely concur on both points. The only question upon the first point arises upon a mistake made by the grantee of the annuity. Suppose the bond had been put in suit; it would have been a good plea to plead that the annuity had been granted in satisfaction of the debt. Upon the 4th section of the act, (for the third does not relate to the question,) the case is equally clear. If the words privity and consent were not in the act, it might be different: but this was an accepted bill: there was an omission in the drawer to supply the acceptor with funds, but the acceptor had nevertheless made himself liable. Besides, the bill is immediately taken to the drawer, and the drawer pays it. There is no injurious delay, or at least no evidence of the privity and consent of the drawer. A distinction is to be remarked in the language used in the act. The expression in the three preceding sections is, that the instrument shall be wholly null and void, the fourth only says that it shall and may be lawful for the Court to cancel the deeds; which is of a very different import. Where those words have been construed to be imperative, they have been so held from the nature of the case: it is in this case discretionary with the Court, whether they will entertain the application.

Rule discharged. (*a*)

(*a*) *Heath* J. was absent this day.

1808.

Nov. 10. **Norden v. Williamson and Twibill.**

If a Plaintiff and a Defendant are both willing that the Plaintiff shall give evidence in the cause, he is an admissible witness on his oath; Although he comes to defeat the claim of another Plaintiff suing jointly with himself.

THE declaration in this case was for work and labour done, and materials furnished by the Plaintiffs, who were partners in trade. At the trial of this cause, at the *Westminster* Sittings after the last term, before *Mansfield* C. J. evidence was given that the Defendant had issued orders to the Plaintiffs to execute the work. To rebut this evidence, the Defendant called, among other witnesses, the Plaintiff *Twibill*, who proved that the orders for the work were received by himself, and were not given by the Defendant. And upon this evidence the jury found a verdict for the Defendant.

Cockell Serjt. on this day moved for a new trial, upon the ground that *Twibill's* testimony was inadmissible. There is no case in the books where a Plaintiff is permitted to take an oath as witness, except that of an action against the hundred, where it is done under the especial directions of an act of parliament. When a Plaintiff enters the witness-box, it cannot be known to what effect he will give his testimony.

Mansfield C. J. This is a new case. I never before remember a Plaintiff to have been called as a witness, and perhaps the same thing may rarely occur again. Since the decision in Lord *Melville's* case it is no longer law that a man cannot be compelled to answer against his civil interests, but supposing that decision will not extend to compell a Plaintiff to answer in his own cause, at least, I know no reason why, if the Defendant is willing to admit him, and the Plaintiff is willing to give evidence against himself, he should not be suffered to do so. If his evidence proves adverse, the consequence must

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NORDEN v. WILLIAMSON and TWIBILL.

must fall on the Defendant, who ventures to call him. If the Plaintiff had made a declaration out of court that he had never been employed by the Defendant, evidence of that declaration would be admissible. How is the proof less credible, if the Plaintiff comes into court and declares the same thing upon his oath?

CHAMBRE J. The Defendant may waive the objection to the Plaintiff's testimony, if he will.

Rule refused (*a*).

(*a*) *Heath* J. was absent this day, owing to indisposition.

WARREN *v.* WEBB.

Nov. 12.

The action upon the case for a nusance is local in its nature, and the nusance must be proved to have been committed in the county where the venue is laid.

If no place and county is alleged where the nusance is committed, the county in the margin shall be intended.

MIDDLESEX, to wit. The Plaintiff declared that he was possessed of a dwelling-house in the parish of *St. George the Martyr* in the county of *Surrey*, and that the Defendant possessed a shop contiguous, and a wooden spout affixed thereon, for carrying off the rain water from the roof, which spout it belonged to the Defendant to keep in such repair, that no injury should happen to the Plaintiff's dwelling-house; and alleged that the Defendant suffered the spout to be out of repair, to wit, at *Westminster*, in the county of *Middlesex* aforesaid, whereby the rain water soaked through the spout, and penetrated and injured the Plaintiff's wall, to wit, at *Westminster*, in the said county. The premises were proved to be in *Surrey*. At the trial of this cause at the *Westminster* Sittings after last *Easter* term, before *Mansfield* C. J., a verdict was found for the Plaintiff, with liberty for the Defendant to move to enter a nonsuit, upon the ground that this was a local action, and that the venue ought to have been laid in *Surrey*, where the nusance

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nusance was committed, whereas it was alledged to have happened in *Middlesex*. Accordingly, *Cockell* Serjt. in *Trinity* term last, obtained a rule *nisi* to enter a nonsuit, upon the authorities of *Fitz. N. B.* 426. *Ass, Nus.* and *Bulwer's* case, 7 *Co.* 57.

Best Serjt., in shewing cause, contended that this irregularity was cured by verdict, under the st. 16 & 17 *Car.* 2. *c.* 8., and cited the case of the *Mayor of London* v. *Cole and others*, 7 *Term Rep.* 583.

Cockell supported his rule.

Cur. adv. vult.

MANSFIELD C. J. on this day delivered the opinion of the Court.

The objection taken in this case was, that the Plaintiff did not at the trial support his declaration. The Defendant's counsel supposed that in the declaration the Defendant's house was alleged to be in *Middlesex*, and the evidence was that the house was in *Surrey*. On reading the declaration it at first appeared to me that the *videlicet* in the county of *Middlesex*, as applied to a house or any thing else, in *Surrey*, in its nature local, is nonsense, and a contradiction in terms. And upon consideration the true sense appears to be this; it is a description of the house, a local object, which it states to be in *Middlesex*, and consequently the objection must prevail. If this is not a description of the place where the Defendant's house is situated, there is no description of it, and if no place is alledged in the declaration, it must be intended that the house lies in the county in which the nusance is alleged to be committed, which is *Middlesex*. Therefore *quacunque viâ datâ* the declaration is not supported.

Rule absolute.

1808.



STEEL *v.* BROWN and PARRY.

Nov. 21.

A bill of sale of goods made for a valuable consideration, unaccompanied with the possession, is valid as against the vendor. And as against a creditor, with whose knowledge and assent it was given.

TROVER. The Defendants, who were brewers, in order to enable *Cockburne* to purchase the lease and fixtures of a public house, for which he was in treaty with the Plaintiff, advanced to him 200*l.* which was secured to them by an assignment of the lease, and a judgment acknowledged by *Cockburne*; the Plaintiff received in part of the price this sum, and two other notes payable at a future period, and taking from *Cockburne* a bill of sale of the fixtures and goods, as a security for his payment of the residue, put both the house and the goods into his possession, which continued for 9 months, when (*Cockburne*'s affairs being embarrassed,) the Plaintiff took possession of the goods. Soon after the Defendants took the goods in execution as the property of *Cockburne*; but they immediately apprized the Plaintiff of what they had done. Upon the trial of this cause, before *Mansfield* C. J., the Defendants failed in proving their judgment, and the Plaintiff obtained a verdict.

Vaughan Serjt. now moved for a new trial, upon the ground that, inasmuch as *Cockburne* had remained in possession of the goods for a considerable time after executing the bill of sale, the Plaintiff had no title to them, nor any legal possession under that instrument. *Edwards* v. *Harbin*, 2 *Term Rep.* 587.

MANSFIELD C. J. There is no colour for setting aside this verdict, nor any pretence to say that this bill of sale was fraudulent as against *Cockburne*, and his assignee has only the same right that he had. The notice of the levy given to the Plaintiff, shews that the Plaintiff took this security with the knowledge and assent of the Defendants

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ants. No case has decided that a bill of sale, unaccompanied by the possession, may not, under certain circumstances, be fair and valid. If one executes even a colourable bill of sale for a valuable consideration, though the vendor remains some time in possession, it is a good bill as between the parties. All that has been said about the genuineness of the transaction, relates only to third persons: but in the present case, if the Defendants had proved themselves to be creditors, which they failed to do, it is very doubtful whether they could have been in a better situation than they now are, on account of the communication which appears to have been made at the time of the transfer of the lease. The evidence shewed that the parties agreed to go hand-in-hand, the Defendants having the security of the lease, and the Plaintiff the security of the bill of sale of the goods and fixtures.

LAWRENCE J. I am of the same opinion. A bill of sale is good as between the parties to it, though no possession is taken at the time when it is executed. The case of *Harbin* v. *Edwards* is good law, but not applicable here: that was the case of creditors.

Rule refused. (*a*)

(*a*) *Heath* J. was absent, owing to indisposition.

1808.

HIDER *v.* DORRELL.

Nov. 25.

One person acted as clerk to two bodies of public officers. A notice of action required by statute was given him, addressed to him as clerk to the one body, the cause of action arising under the authority of the other body.

Held that the notice was insufficient.

TRESPASS for pulling down a boarded partition, which the Plaintiff had attached to the front of his house. At the trial of this cause, before *Mansfield* C. J. the Plaintiff was nonsuited upon the ground that he had not given the previous notice of the action required by an act of parliament.

Best Serjt. having on a former day obtained a rule *nisi* for a new trial, *Shepherd* Serjt. now shewed cause, upon the following state of the facts. By a paving act, 30 *Geo.* 3. *c.* 53. *s.* 68., no action shall be commenced against any commissioner, committee-man, or other person acting under any of the committees therein mentioned, for any thing done in pursuance of that act, until after the expiration of 14 days next after notice given in writing to the clerk of the commissioners, or the clerk of the respective committees, as the case may be. By another act of a similar nature, 47 *Geo.* 3. *c.* 38. *s.* 55., no person shall recover in any action to be commenced for any thing to be done in pursuance of that act, unless notice in writing shall be given to the Defendant 21 days before such action shall be commenced. The Plaintiff's attorney had delivered to *Parton* a notice, styling him the clerk to the *commissioners* acting under the s. 47 *Geo.* 3., [setting out the title of the act,] and informing him that an action would be commenced at the expiration of *twenty-one* days. *Parton* was regularly appointed and served as clerk to the *committee* of paving appointed under the 30th *Geo.* 3., and occasionally acted as clerk to the commissioners appointed under 47 *Geo.* 3. The trespass complained of was done under the authority of the committee. *Shepherd* contended that the notice must be such

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HIDER v. DORRELL.

as to direct the attention of the body of officers affected by the action, to that act of their servant, for which they were entitled to tender amends. The notice referred only to some act done under the authority of the 47 *Geo.* 3.

Best and *Vaughan*, Serjts., *contrà.* The statute only requires that the clerk should be informed that some person acting under the body to whom he was clerk, had committed a trespass. This notice is sufficient to apprize *Parton.* It is no grievance that the previous notice was for 21, instead of 14 days. If the notice had been directed to *Parton*, rejecting his description, it would have been good.

MANSFIELD C. J. It is impossible to make this a good notice. If the only mistake had been the calling *Parton* clerk to the commissioners, instead of the committee, perhaps we might have gone so far, as to construe commissioners to mean committee. It was meant that notice should be given to the body under which the individuals act; but this notice expressly refers to the 47 *Geo.* 3. which must direct the clerk's attention to persons acting under the authority of that statute, and the notice mentioning the interval of 21 days, the time therein prescribed for the tender of amends, confirms that construction, since the 30th *Geo.* 3. gives a shorter time. This must therefore be considered as a notice to those commissioners of an act done by some one under their authority. If this be the right interpretation, no notice at all is given to the committee; and if *Parton* had no other information than what he derived from this paper, it could never occur to him to apprize the committee of the intended action.

CHAMBRE and LAWRENCE Js., concurring, the rule was

Discharged.

1808.

TOULMIN *v.* ANDERSON.

Nov. 25.

If a Defendant dies pending the argument on a point reserved, on which judgment of nonsuit is afterwards given, his representatives are entitled, upon application to the Court, to enter up the judgment of the term next after the trial, that they may get the costs of the nonsuit.

BEST Serjt., on a former day in this term, had obtained a rule *nisi* that the judgment of nonsuit, which had been given in this case upon a point reserved at the trial of the cause, at the Sittings after last *Michaelmas* term, when a verdict passed for the Plaintiff, might be entered up as of the last *Hilary* term; being the next term after the trial, and during which term the Defendant died. He moved this upon the authority of the case of *Tooker* v. *The Duke of Beaufort*, 1 *Burr*. 147. and *Trelawney* v. *The Bishop of Winchester*, 1 *Burr*. 221. So is it if the Defendant dies after the interlocutory judgment, by st. 8 & 9 *W*. 3. *c*. 11. *Mayor of Norwich* v. *Berry*, 4 *Burr*. 2277.

Shepherd Serjt. on this day shewed for cause against the rule, that the defence of the underwriters in this case (*ante*, 221.) had been so ungracious, that the Court would not aid them to recover their costs, unless it were a matter of absolute right.

The Court observed, that if the nonsuit had been submitted to at the time of the trial, to which time the subsequent decision of the Court had relation, the judgment would have been entered up of *Hilary* term; and they could not therefore refuse the present application.

Rule absolute.

Best was to have supported his rule.

1808.

BLAKEY *v.* PORTER.

Nov. 25.

If one part only of an indenture is executed, the Court will compel the party having the custody of it, to produce it for inspection, upon an action commenced against himself by the other party.

BEST Serjt. had obtained a rule *nisi* that the Plaintiffs might be permitted, at their own expence, to read and take a copy of an indenture of assignment of a lease made between the Plaintiffs and Defendant, which was then sworn to be in the custody of the Defendant. The Plaintiffs had occasion to commence the present action upon the covenant which it contained, and no other part of the indenture had been executed.

Shepherd Serjt. now shewed cause. He observed that this was an unheard-of application to the Court, requiring the Defendant to produce his own title, not being illegally in his possession, for there was no pretence to say that the custody of the assignee was not the proper custody for the deed. There was only one instance of a practice at all similar to that which was now prayed, namely, the production of ship's articles; and that was under the provision of especial acts of parliament, 2 *G.* 2. *c.* 36. *s.* 7. and 31 *G.* 3. *c.* 39. *s.* 6. The Plaintiffs may apply to a Court of equity, and then the Defendant has an opportunity of answering the application. If this were to be granted here, the consequence would be that if a defect is at any time suspected in a conveyance, it is only necessary for the Plaintiff to commence an action of covenant, in order to obtain access to the deed.

MANSFIELD C. J. Of what use would the Defendant's covenant be if the Plaintiff could not get access to it? Parties, in order to save the expence of double stamps, are unwisely content to execute one part only of an indenture. Is it not, however, the necessary consequence of this practice, that the party who has the custody,

tody, undertakes to produce the deed when wanted, for the use of both?

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HEATH J. In the case of a copyholder, this Court will interfere, and order the lord of the manor to grant an inspection.

LAWRENCE J. The Defendant has shewn no reason why the Plaintiff should not have access to the deed.

Rule absolute.

UNDERWOOD *v.* MILLER and FATKIN.

Nov. 25.

Upon the transfer of a share in a vessel, it is not necessary that the indorsement upon the certificate of registration should express the share to be *all* the vendors interest.

The omission of the officer at the out-port to transmit a copy of the indorsement to the custom-house in *London*, does not invalidate the transfer.

THIS was an action brought to recover from the Defendants, as owners of the ship *Ceres*, a sum of money for the salvage of that vessel, which, in *February* 1808, had been saved by the Plaintiff, under circumstances of imminent danger. Upon the trial of this cause, before *Mansfield* C. J., at the *Guildhall* Sittings after last *Trinity* term, the Plaintiffs produced, in the custody of the proper officer of the customs in *London*, a copy of an indorsement upon the certificate of registry transmitted from *South Shields*, by which it appeared that the Defendants, on the 14th of *February* 1806, were sole owners of the *Ceres*. The Defendants proved a subsequent transfer by *Fatkin* to *Miller* of one undivided 4th part, not calling it *all his interest*, made in *September* 1807, but no copy of the indorsement upon the certificate of registry was, at the time of the trial, to be found in the principal office in *London*, nor was it transmitted thither till *March* 1808. Upon this evidence the Plaintiff was nonsuited.

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Cockell Serjt. had obtained a rule *nisi* for a new trial, first, upon the ground that the Plaintiff had used all due diligence to discover who were the owners, by searching at the custom-house in *London*; and as he had been misled in his inquiries only through the negligence of the owners, who had omitted to procure the due registration of the subsequent transfer, it was not competent for them to use a defence which was occasioned by their own neglect; and, secondly, upon the ground that there was a defect in the second transfer, which, to comply with the terms of the act 34 *G*. 3. c. 68. s. 15., ought to state that the one-fourth part was the whole interest of the vendor; and the rather because the two Defendants were before described as sole owners, which implies that they possessed equal moieties.

Shepherd Serjt. now shewed cause against this rule. The only question is, Whether, at the time when this assistance was rendered to the vessel, *Fatkin* was legal owner? which, according to the authority of *Westerdell* v. *Dale*, 7 *Term Rep*. 306. is sufficient to charge him; for it is not pretended that he had any beneficial interest, upon which he can be liable. It does not necessarily follow that when two are joint sole owners, they are owners of equal moieties; and even if that were *primâ facie* to be implied, the presumption here is rebutted by the prior register of a transfer in 1805, of one fourth part from *Miller* to *Fatkin*, which shews that *Fatkin* never possessed more than 1-4th. The requisitions of the act have been complied with; for the indorsement states that *Fatkin* had transferred all his one-fourth part. As to the omission to enter this transfer in the registry of the *London* custom-house, it is the duty of the officers of government, not of the vendor, to transmit the copy from the out-ports, and to make the entry here; and their

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their neglect cannot affect the rights of the contracting parties.

Cockell and *Runnington*, Serjts., in support of the rule, relied on the supposed defect in the form of the indorsement; for the statute, they said, was imperative that the indorsement should express the interest conveyed to be the whole of the vendor's interest: and the requisites not being complied with, the bill of sale was totally void. The legislature intended that the face of the certificate should instantly shew whether the whole property was in *British* subjects or not, and if the rule be once departed from, it would open a door to fraud; for a vendor possessed of half might convey one fourth part to a subject, and the other fourth to a foreigner, who would thereby obtain, as to this property, all the privileges of a *British* subject.

MANSFIELD C. J. This case must be considered in the same light as if *Miller* claimed this once-fourth part of the ship against *Fatkin*, and had contended that for want of a proper certificate the transfer was void. In that case, I think, the present indorsement must be considered as sufficient: where the act of parliament contemplates a transfer of the whole ship, it uses the expression "all my, (or our) right, share, and interest;" and it is plain that the persons who penned the act omitted to provide for the case of a sale of a part: but the legislature only meant that the indorsement should shew what was the interest conveyed: for it would be impossible literally to follow this act, and to say "all my interest," when the vendor meant to convey a part only.

HEATH J. I am of the same opinion. The great object of this act was to prevent foreign ships from having the privileges of *English* vessels, and foreigners from

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from possessing a share in our ships, which enjoy those privileges. It was urged that it ought to appear upon the register what was the whole amount of the interest of the several parties; but upon a reference to former registers, the amount of their interest appears.

LAWRENCE J. If the construction contended for should prevail, it would be impossible for any owner who wishes to sell, to divest himself of a less property than all his interest: and I do not see how the consequence would follow from a more reasonable interpretation of the act, which has been objected, that foreigners would acquire an interest; for if a person having one half, should transfer one-fourth, he would himself still remain master of the other fourth. Another answer is, that if the objection is well founded, the former transfer from *Miller* to *Fatkin* is void, and all the interest still remains in *Miller*.

CHAMBRE J. Neither of the instruments shews more than one-fourth part to have been conveyed from *Miller* to *Fatkin*, and when the latter re-conveys, he re-conveys one-fourth part. It would be contrary to the policy of the law to prevent persons possessed of property in ships from alienating any thing unless they should alienate their whole interest. It would be a narrow and rigorous construction indeed, to say that the form which is given in the act for the sale of all, must be the only form applicable to all cases.

Rule discharged.

DEWELL v. MOXON and Another.

Nov. 25.

Upon a contract ro carry and deliver goods, the possession of the goods still remaining with the Defendant, trover lies.
Whether the captain of a vessel sent to earn freight has authority to contract to carry a cargo freight free, *quære*.

THE Plaintiff declared that the Defendant *Moxon* being owner, and the Defendant *Biggin* master of a ship lying at *Carlshamm*, and about to sail for *Hull*, he had at their request put on board her a cargo of iron and deals, to be delivered on her arrival at *Hull* to his own order, *free of freight*; he then averred that he consigned the goods to *Lindley* and *Zimmerman* at *Hull*, and that the vessel sailed and arrived, but that the Defendants refused to deliver the goods. There was also a count in trover. This cause was tried upon admissions at the Sittings at *Guildhall* after last *Trinity* term before *Mansfield* C. J., and it appeared that the owner had fitted out the ship for *St. Petersburgh*, to earn freight: but the captain being prevented by an embargo from proceeding thither, put into *Carlshamm*, where being unable to obtain freight, he took on board these goods shipped by the Plaintiff, and signed a printed bill of lading, by which he engaged to deliver them "to order, or receivers of the cargo, or their agent, on being paid freight for the said goods," after which was inserted in writing, the word "*Franco*." The cargo was unloaded by the Defendant *Moxon*, who tendered the goods upon payment of freight; which was refused; and at the time of the trial they continued in his possession. *Mansfield* C. J. thinking that the Plaintiff had not established the contract alleged in the first count, directed a nonsuit. The Plaintiff then prayed that he might take a verdict on the count in trover, against the Defendant *Moxon*. His Lordship recollecting an expression of Lord *Mansfield* C. J. in *Ross* v. *Johnson*, 5 *Burr.* 2827. that in order to maintain trover there must be an injurious conversion, and that mere non-delivery was not equivalent to a refusal to

deliver

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deliver the goods, thought the Plaintiff was not entitled to recover in that form of action, but gave him liberty to move to enter a verdict upon that count, if the Court should be of opinion that it could be supported. Accordingly a rule *nisi* having been granted,

Cockell, *Clayton*, and *Manley*, Serjts. now shewed cause. They observed, that if the Plaintiff was entitled to any relief, the Court would not suffer him to enter a verdict, but would grant a new trial, for that the cause had been stopped before the Defendants had gone into the defence which was applicable to the count in trover. They also urged that it would be proper to strike the Defendant *Biggin* out of the record. If the owner and captain are each liable, yet they are master and servant, they are not partners; they are not both liable in the same respect. If a recovery be had against one of them, the other is discharged: the Plaintiff may elect which he will sue. The testimony of the master was of the utmost importance to the Defendant *Moxon*, and he was made a party to the suit only to exclude his evidence. They suggested, that the captain being a stranger to the *Swedish* language, the word "*Franco*" had been fraudulently added without his understanding its import; and this insertion would not defeat the Defendant's right to freight, according to the authority of 2 *Atk.* 32. where the lender of 50*l.* gave a note, whereby he promised *not* to pay 50*l.* on demand, but was held liable on the note. But if the fact should prove otherwise, the Defendant *Moxon* was entitled to a reasonable compensation for the use of his ship: he was not bound by this contract to carry freight free, to which he was not privy, and which it was not within the scope of the captain's authority to make for him. The owners of a ship are bound by the lawful contract of the master, only if it relate to the usual employment of the ship; and those who engage the

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the freight, must take notice of the extent of the captain's authority. *Boucher* v. *Lawson*, *Abbott* 119. *3d ed.* *Boson* v. *Standford*, *ibid.* *Ellis* v. *Turner*, *ibid.* 120. When a ship is sent out to earn freight, what can be more inconsistent with the usual course of her employment than to contract for her carrying a cargo freight free. And the contract in this case was not for the freight only, but subjected the Defendant to the risk or expence of insurance without any consideration, since not even the perils of the seas were excepted in the bill of lading. It is said, but not proved, that the captain purchased these goods of the Plaintiff for a house of *Moxon* and Co. other than the Defendant. But to purchase goods for the use of strangers, is an act still further removed beyond the limits of the captain's authority. This was a contract, too, made without consideration, and for that reason also invalid; and that objection would equally answer the count in trover, which would not lie if the Defendants had a lien upon the goods under an implied *assumpsit* for the freight.

Shepherd and *Best*, Serjts. *contra.* The practice of contracting to carry goods freight free, that in case the consignee do not receive and pay for them, the consignor may have them back at the invoice price at the port of delivery, is very frequent in trade, and this was not a case of fraud. If a loss had happened on the voyage, although the perils of the sea were not excepted in the bill of lading, yet inasmuch as the owner carried the goods gratuitously, it might have been questionable whether he would be responsible for the loss, in the same degree as if he had received freight; but the master having undertaken to bring home the goods freight free, and it clearly appearing that such was the contract which the shipper intended to make, the law cannot raise an implied contract to pay freight, to which it is clear that the

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the shipper never agreed. Perhaps if the owner had arrived in *Sweden* before the ship sailed, he could have annulled the contract made by the captain; but the question is not whether if he had come thither he would have been bound by that contract to carry the cargo gratis; but whether, after having received and carried the goods, he can afterwards annul the contract upon which the Plaintiff put them aboard, and impose another condition. This is not the case of an absence of all agreements, where the very putting the goods on board would be evidence of an implied contract to pay freight, but here that presumption is rebutted by a positive contract, which is, to carry the goods freight free. The case is the same as if the owner himself had been present. For the captain is a general agent to the owner in every thing that relates to the disposition and management of the ship. It is peculiarly necessary that the master of a ship should have ample power, more than any other sort of agent. If it were otherwise, the grievance would be intolerable, for he is the only person with whom freighters in foreign ports can communicate, to make their contracts. Freight was in this case offered to the captain on certain terms, and it clearly was within the scope of his agency to accept or refuse it. If in any particular instance he exceeds the limits of his authority, he is liable to his owner for the abuse of it, but the contract must stand. *Rinquist* v. *Ditchell*, *Abbott* 122. This is not necessarily a *nudum pactum*. In many cases it may be advantageous to a ship to take in goods for ballast. But if a captain in a foreign port, wanting ballast, had taken in goods upon an engagement to carry them freight free, the owner cannot afterwards demand freight because he thinks the captain has acted unwisely. Besides, any thing which moves detriment to the Plaintiff, is a good consideration. Here the Plaintiff gives up the possession of his goods, and the advantages he may derive

from

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from that possession, and subjects them to a risk, which is a detriment, and a sufficient consideration. The owner therefore had no right to detain these goods under the pretence of a contract for freight. And the Plaintiff having been nonsuited on his count upon the contract, is entitled to recover upon his count in trover, precisely as if the declaration had contained no other: the misjoinder, if any, could be taken advantage of only on demurrer, or in arrest of judgment. The action of trover clearly lies in this case, although the transaction is founded on a contract. Every case in which the amount of wharfingers' dues, or the right of stoppage *in transitu* has been contested, has been trover, yet all these cases are founded in contract. Wherever the goods arrive in specie, trover is the proper form of action. And although a simple refusal by a carrier to deliver is not sufficient evidence of a conversion, because the goods may have been lost by causes against which the carrier does not insure, yet a refusal accompained by proof of the possession continuing, is sufficient evidence of a tortious conversion, until a title to retain the goods is shewn. Here the Defendant *Moxon* has unloaded the goods; if if he is not entitled to freight, trover well lies against him, and then all the common principles applicable to that species of action apply here, and the Plaintiff is entitled to recover against one Defendant in trover, though not against the other.

MANSFIELD C. J. In this case the words "on payment of freight" are printed, and in the common form; the word "*Franco*" was especially inserted, and it is very difficult to imagine any other meaning to the word than that the goods should go free of freight. The question is, Whether the Plaintiff, having obtained the use of the owner's ship without his consent, the owner is not entitled to a *quantum meruit* for freight? There was no considera-

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consideration given for the bill of lading, the deals were not consigned to the owner of the ship.

LAWRENCE J. In the case of policies why are the words "on goods, or on ship," inserted in the margin in writing, although the printed form is otherwise? As to the extent of the captain's authority, suppose a butcher's servant should give away his owner's mutton to persons who dress it and eat it, would not the butcher be entitled to payment?

The Court were unanimous that the action of trover would well lie in this case; but upon the other point they took time for consideration.

Upon this day, the Court being of opinion that the circumstances of the case ought more fully to appear, directed that the Defendant *Biggin* should be struck out of the record, and made the

Rule absolute for a new trial.

Nov. 26.

LAWSON *v.* MOGGRIDGE.

An action upon the case for negligence in driving the Plaintiff's carriage contrary to an implied *assumpsit*, is not a demand coming within the jurisdiction of the *Southwark* Court of Conscience.

BEST, Serjt. had on a former day obtained a rule *nisi* that the prothonotary who had allowed the Plaintiff his costs in this cause, might review his taxation. The action was brought to recover the sum of 5*l.* demanded as due for an injury done to a new chaise, lent upon hire by the Plaintiff to the Defendant, while it was in his service: the Defendant at the time of the action brought was an inhabitant trading and dealing within the town and borough of *Southwark* and the eastern part of the hundred of *Brixton*, and within the limits of the jurisdiction of the *Southwark* Court of Requests, as regulated by the st. 46 *Geo.* 3. *c.* 87. The cause was tried at the

Sittings

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Sittings after last *Trinity* term before *Mansfield* C. J. when a verdict was found for the Plaintiff, in 5*l*. damages, and 40*s*. costs.

Shepherd, Serjt. now shewed cause against this rule, upon the ground that the action, being founded upon negligence or misfeasance, in driving the carriage against a post, contrary to the alleged undertaking of the Defendant to drive it carefully, did not fall within the purview of this statute, which was wholly confined to debts. Besides, the Defendant had adopted the wrong course: if he had any title to be relieved, the proper mode to avail himself of this act would have been by a suggestion on the record.

Best, Serjt., in support of the rule, cited *Foote* v. *Coare*, 2 *Bos. & Pul.* 589. where the same objection was taken, but the Court allowed relief upon motion. The distinction, he said, was this: where the intent is to call upon the other party to pay costs, it is necessary to enter a suggestion, but where the intent is to exonerate the party applying, and the other party is not entitled to costs at all, a motion is sufficient to take them from him.

The Court were clear that the cause of action was not within the jurisdiction of the Court below.

Rule discharged.

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Nov. 28.

WILSON v. TURNER.

Offers made by the Plaintiff's attorney in the hearing of a third person to do an act relative to the Defendant, which lay within the scope of his authority, are not admissible evidence to affect the Plaintiff with such offer.

Otherwise if the offers had been made to the Defendant.

THIS was an action for maliciously arresting the Plaintiff, and holding him to bail for seven hundred pounds. Upon the trial of this cause, at the *Guildhall* Sittings after last *Trinity* term, before *Mansfield* C. J., it was proved that *Wilson* had been concerned with *Johnson* in a course of smuggling transactions, during which a debt became due from *Johnson* to *Turner*, for which *Wilson* became bail for *Johnson*. A bill for 300*l.* also became due from *Wilson* to *Johnson*, which was paid by *Turner*, who had on that occasion become bail for *Wilson*. *Johnson* was indebted to *Wilson* in the sum of 3000*l.*, for which *Wilson* had arrested him. *Johnson* then arrested *Wilson* for 1000*l.*; and *Turner* in a joint-action against *Wilson* and *Johnson*, in *February* 1806, arrested *Wilson* for 700*l.*, but did not arrest *Johnson*, for whom a common appearance was entered. In *Michaelmas* term, 1806, after having been eight or nine months in prison, *Wilson* was superseded. *Hill* acted as the attorney in both actions, and proceeded in the joint action against *Wilson* only, and not against *Johnson*. To shew in what spirit these arrests are made, *Teague*, an officer of the *Compter* was called, who proved that about two months after the arrest of *Wilson*, *Hill* came to the prison, when the Plaintiff would not see him, and the witness asked him, why *Wilson* was kept in custody; *Hill* replied, if he will exchange receipts with my clients, or my client, I will release him. *Best* Serjt., for the Defendant, objected that this declaration of *Hill's*, not being accompanied by any act of his done in his character of attorney, was not admissible evidence to affect the Defendant. The jury found a verdict for the Plaintiff with 1000*l.* damages.

Best

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Best Serjt. had obtained a rule *nisi* to set aside this verdict on account of the admission of the evidence of *Hill's* conversation.

Cockell Serjt. shewed cause. Under the circumstances it must be presumed that *Hill* was acting as the attorney of *Turner*. It is manifest he made this proposal with a design that it should be communicated to the Plaintiff, as a means by which he might attain his liberty. This is not offered as evidence to charge *Johnson* with a criminal act of conspiracy; if it were, it might not be admissible: but it is an act lying within the scope of the authority of the attorney in the cause, who has a right to discharge the Defendant: not only the act of the attorney himself, but even the act of his subordinate agent, will bind the principal in a cause; this therefore can be viewed only as the act of an attorney acting within the limits of his authority, and in that view evidence of his conversation is admissible to affect his client.

Best Serjt. *contrà*. If this evidence were admissible in a civil cause, it would also be admissible in a criminal court. The authority of an attorney, like all other authorities, has its limits, and it is clear that *Hill* was not acting within those limits. Besides, the proposal is not made to the Defendant; and it would be of the worst consequence, if the loose conversations of attornies, held with strangers, were made binding upon their principals.

Cur. adv. vult.

MANSFIELD C. J. on this day, after recapitulating the facts of the case, delivered the opinion of the Court. Soon after the trial I had great doubts whether I ought to have admitted that evidence, and after great consideration the Court think it ought not to have been received, for as it was not accompanied by any act, it cannot be considered as done by the order of *Turner* or *Johnson*.

 I am

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I am not aware that any conversation of an attorney, not spoken upon oath, nor proved to be authorized by his client, can bind the client. *Hill*, it is true, speaks as if he had power to discharge the Plaintiff, but that power he certainly had under his general authority. If *Hill* had gone and made the proposal to *Wilson*, I rather think the evidence ought to have been received. Although it is impossible not to believe that the motive for this arrest was either the wish to obtain the release of *Johnson* from the debt of 3000*l.* or mere malice, I do not know that the Court can so far put themselves in the place of a jury, as to say that it is impossible that the case could be varied by the exclusion of this evidence; and therefore the rule for a new trial must be

Made absolute.

Nov. 28.

WILLIAMS *v.* MILLER.

Where a statute prohibits an act, and gives damages for the violation, with costs of suit, it does not take away the judge's power to certify under 43 *Eliz.* c. 6. that the costs are less than 40*s*.

THIS was an action upon the case framed upon the statute 34 *Geo.* 3. *c.* 23. to recover damages of the Defendant, who had copied and sold a pattern of a calico of which the Plaintiff was the proprietor. Upon the trial at *Guildhall*, at the Sittings after last *Trinity* term, before *Mansfield* C. J. and a special jury, the Plaintiffs obtained a verdict with a shilling damages. The Chief Justice indorsed upon the panel a certificate that the damages did not amount to 40*s*., upon seeing which the prothonotary refused to tax the Plaintiff any more costs than damages. The first section of the act 27 *Geo* 3. *c.* 38. *s.* 1., which is made perpetual by the 34 *Geo.* 3., gives the Plaintiff such damages as a jury shall assess, together with costs of suit.

Best Serjt. on a former day had obtained a rule *nisi* that the prothonotary might tax the Plaintiff his full

costs

costs, upon the ground that they were given by the statute.

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Shepherd and *Lens* Serjts. now shewed cause.. The statute operates nothing; it does not take away the Judge's power to certify. In the cases where that is circumscribed, the stat. 43 *Eliz.* *c.* 6. gives the special exceptions.

Best Serjt. in support of the rule. The intention of the legislature was to give the full costs of suit, for it is impossible that the damages to be given for imitating one single print can ever amount to forty shillings, and therefore, unless the legislature had intended specially to give costs, they would have left this species of property un protected. The statute being subsequent to the 43 *Eliz.* cannot be restrained by the exceptions of that act: and unless the words of the statute are nugatory, full costs must follow the verdict. There is no instance in which a statute having given costs, the Judge has taken them away by a certificate.

MANSFIELD C. J. The law would have given the action upon the prohibitory clause, if the act had not proceeded to direct it. The statute gives costs, but if it had merely said, "the Plaintiff shall recover damages," the costs would have followed: therefore this statute in giving the action gives nothing.

CHAMBRE J. The Plaintiff will still have his costs, though they will be small. The statute contains no words to curtail the Judge's discretion to certify.

Rule discharged.

Note. It was not observed in the course of the argument, that the stat. 27 *Geo.* 3. *c.* 38. *s.* 1. in prescribing

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the mode of redress to be pursued for offences committed in *Scotland*, gives damages with *full* costs of suit.

STOUGHTON v. LEIGH.

Nov. 24.

Dower is due of mines wrought during the coverture.
Whether by the husband, or
By lessees for years, whether
Paying pecuniary rents, or
Rents in kind,
And whether the mines are under the husband's own land,
Or have been absolutely granted to him to take the whole stratum in the land of others.
Such a grant it a grant of a real hereditament in fee simple.
But dower is not due of mines, or strata, unopened, whether under the husband's soil or under the soil of others.
If land assigned for dower contain an open mine, tenant in dower may work it for her own benefit.
Dower may be assigned of mines, either collectively with other lands,
Or separately of themselves.
It shall be assigned by metes and bounds if practicable: otherwise, either by,
A proportion of the profits, or,
Separate alternate enjoyment of the whole for short proportionate periods.
If the heir, being of full age, assign excessive dower, he has no remedy at law.
If the sheriff assign excessive dower, the heir may have a *scire facias* to obtain an assignment *de novo*. Or if
The heir under age assign excessive dower, he may have relief by writ of admeasurement of dower.

THIS was a case directed out of the High Court of Chancery for the opinion of this Court: the facts were in substance as follow.

John Hanbury was in his life time, and during his marriage, and at his death, actually seized of divers landed estates, and of several mines and strata of lead and coal: namely, in his own land, a lead mine and a coal mine, neither opened, wrought, or demised. Two lead mines and two coal mines, which, during the coverture, he had demised to tenants for years, reserving pecuniary rents, to be paid whether they did, or did not open and work them; and of each sort of these one had been opened before his death, by the tenant, who still continued now to work it; and the other had not been

opened;

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opened; a lead mine and a coal mine which he had demised during the coverture to tenants for years, rendering not pecuniary rents, but quantities of the lead ore and coal when gotten, and the tenants were by the terms of their leases at liberty to work or not to work these mines; the coal mine was at the time of *John Hanbury*'s death, and of this suit, wrought by the tenant; the lead mine had not been opened; and two lead mines and two coal mines, which had been opened and were wrought by the deceased himself at the time of his death, one of each sort of which mines had, from the time of his death, ceased to be wrought, his heir thinking them unprofitable: the other of each sort the heir continued to work to profit. The first question was, whether *John Hanbury*'s widow were entitled to dower of all, or any, and which of these mines, and what the widow could claim to be legally assigned to her thereout as her dower? The deceased was also entitled to the following minerals lying under land, which was not his own, but wherein he had purchased of the land-owner liberties to work through his land: namely, a mine or stratum of coal, and another of lead ore, which he had opened and wrought during the coverture, and was working at the time of his death, since which the heir had ceased to work the lead, but continued to work the coal: a mine or stratum of lead, and another of coal, which he had not opened or wrought; a mine or stratum of lead, and another of coal, which he had demised to tenants for years, rendering at their own option, which they might annually make, either pecuniary rents or rents in kind, commencing from the time when the mines should be wrought. The lead mine had been opened before the death of *John Hanbury*, and the tenants had paid their rents in ore in kind. The coal mine had not been opened, nor was yet opened.

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In case the Court should be of opinion, that the widow was entitled to dower in any of the cases mentioned in the first question; the next question for the opinion of the Court was, Whether she was entitled to dower of all, or any, and which of the mines, strata, or rents secondly above mentioned, and what she could legally claim to be assigned to her, as her dower thereof?

Lastly, soon after *John Hanbury*'s death, the heir let the widow into possession of, and assigned to her for her dower of an estate called (A), certain closes of land, in which there was an open coal mine, wrought at a certain period during the coverture, but which had ceased to be wrought long before the husband's death: and the value of the closes was amply sufficient to answer any demand of dower, without regard to the value of the coal. The widow had, since her husband's death, begun to work this mine, and had retained the profit to her own exclusive use.

The third and further questions, for the opinion of the Court, were, Whether the widow was in law entitled in virtue of her interest of dower, or for any other reason, to work this mine, for her own exclusive use and benefit?

Taking the assignment of these closes, as the widow's dower, to be the act of the heir himself, and to have been a most excessive assignment in point of value, Had the heir by law any and what remedy against the dowress, as against the effect of his own act?

If this assignment had not been his own act, but had been made in the course of legal proceedings under a writ of dower, Would the heir by law, have any, and what remedy against the effect of such assignment?

This case was argued by *Shepherd* and *Best* Serjeants on behalf of the dowress. They contended that mines in general are subject to dower like all othe real property.

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perty. The rule may be thus laid down: wherever a perpetual inheritance arises out of land, or is connected with land, it is the subject of dower. The wife is entitled to dower of all profits of land in which the husband was seised of an estate of inheritance. *F. N. B.* 148. Many things of a less permanent and substantial nature than mines are subject to dower. Springs of water were held in the case of *Rex* v. *Miller*, *Cowp.* 619. to be profits of the land. So dower is due of tolls arising from a public navigable river. *Buckeridge* v. *Ingram*, 2 *Ves. jun.* 652. If a man let lands with liberty of digging, his wife shall not therefore the less be endowed of them. Many of the cases put by Lord *Coke*, 1 *Inst.* 32. *a.* are of things not partaking so much of the nature of real property, as mines. But whatever may be the case as to such mines as are unopened, those which are opened are clearly liable to dower. The husband by opening them has destroyed all other profits of the land, and if they are not continued to be wrought, they will be spoiled. *Clavering* v. *Clavering*, 2 *P. Wms.* 389. So that the working of mines once opened is beneficial, and not detrimental to the inheritance. In *Holby* v. *Holby*, 1 *Vern.* 218. the only dispute was as to the quantum: the right to dower of mines was not doubted. A lessee for years may work mines, if open; *Co. Litt.* 54. *b.*; or if let for the purpose of being opened; *Saunders's Case*, 5 *Co.* 12.; and it is not waste. 2. As to the question how dower shall be assigned of these mines, the rule is, that where the property is of such a nature that a divided third part cannot be given, the wife is to be endowed in a special manner; as of the third toll-dish, or third part of the profits. In the case where the land above and below the mines wrought by the husband belonged to another, her right must be the same; for it is immaterial to whom the surrounding land belongs; the question must be decided upon the nature of the property itself. This

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This can only be considered as real property: it would go to the heir, as would a fishery, which is clearly subject to dower. It is wholly immaterial whether or no the heir has wrought the mines; for since the title of the dowress is derived from the husband, and not from the heir, it cannot be affected by his acts or omissions. Upon these principles the widow is entitled to dower of the mines respecting which the first and second questions are raised. 3. Upon the last question it is equally clear that the widow is entitled to work the mines in the land assigned to her for dower, which were even opened in her husband's life; for tenant in dower is tenant for life, and tenant for life may work all open mines; or at least it rests on the other side to shew on what principle she is to be restrained from the pernancy of the profits of the land assigned her. 4. But if the heir has himself set out two much for her dower, the law gives him no remedy. Where dower, has been assigned by a guardian, or an infant before he was of age, there the law gives a writ of admeasurement of dower; but where the heir being of full age has himself assigned two much, neither he, nor his infant heir shall have the writ. 2 *Inst*. 368.

Lens Serjt. *contrà*. Where mines have been actually wrought as part of the estate of the husband, they may perhaps be collaterally subject to dower together with the rest of his real property. But mines have never been assigned as in their own nature liable to dower. The interest of tenant in dower is a life estate only; but an interest which can enable the possessor to work mines, must be an estate of inheritance, for it is an act of waste in a tenant for life. The words of *Littleton, s.* 36. "lands and tenements" do not decide the question. Dower is not due of every tenement, for dower does not lie of a tenement *eo nomine*. *Kent* v. *Berry*, 1 *Str*. 625. Lord *Coke*, 1 *Inst*, 32. *a*. enumerates all the various

ous species of property which are subject to dower, but he does not include mines amongst them; and it is observable that all the matters there enumerated are the subjects of annual increase and renewal, which mines are not. Thus a common is a collateral right, consisting in the enjoyment of herbage annually renewing. The profits of a mill, of a fair, of the custody of a gaol, are all of an annual nature. Mines are only to be used by the proprietor of the inheritance, for when they are used, they are gone. This reason is still stronger in the case of mines than in that of timber, which is not the subject of dower. *Whitfield* v. *Bewit*, 2 *P. Wms.* 242. tenant for life was equally restrained from waste in both. No case is cited in *F. N. B.* 149. to support the assertion there made. A further reason why mines should not be subject to dower, arises upon the second question; for if a writ should issue to the sheriff to assign dower, there is no rule by which he could possibly assign it. As to the third class of mines, let for a rent, it may be answered, that where the demise comprehends under one rent different species of property, some of them in their nature subject to dower, and others not, it does not follow that the wife shall be endowed of one third of the whole rent, which is partly reserved in respect of property not the subject of dower. As to the fourth class, where a man is not seised of the land, but has purchased a mere privilege to work a mine in the land of another, that cannot be the subject of dower. It is a right not capable of being granted in fee simple, which implies a perpetuity; for the mineral is a produce of the earth, which will not be renewed. It may be admitted that the conduct of the heir in working or in discontinuing the mines, will not decide the question either way. Perhaps the mines which had been wrought during the coverture, and continued to be wrought after the husband's decease, may fall under a different predicament

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from the others. As to the effect of the assignment by the heir himself, it is not to be taken that he has assigned to the widow these mines, but she has taken more than was assigned to her, and that to which she was not at all entitled: he assigned her the land, but did not intend to assign her the mines within it. If land were assigned in which was a grove of oaks, though the only profit of that land would be in the timber, the dowress could not cut a single tree. If indeed the heir had himself assigned more than he ought, of property liable to dower, it seems that he would be without remedy. 2 *Inst.* 367. 8. but this is not a case of actual endowment by the heir, of the mines. The case of *Holby* v. *Holby* decides nothing, for there, although the widow had obtained an unfair advantage, the Plaintiffs were willing to grant her one third of the mines, without raising the question of her right, which therefore never came under the consideration of the Court.

Best, in reply. Lord *Coke* is not an authority to shew that at the time when he wrote, any express decision had been promulgated on the subject of mines. It is said by *Fitzherbert*, *N. B.* 149. that the wife shall be endowed of commons, &c. and of any other estate of inheritance, of which the husband was seised. This passage then, as well as the case of *Holby* v. *Holby*, are express recognitions that mines are subject to dower. In the case of *Clavering* v. *Clavering*, the mines were opened subsequent to the creation of the estate for life. In the case of *Whitfield* v. *Bewit*, all the mines were unopened. As to the strata in another person's land, the husband had not, as it has been said, a mere privilege; he had an exclusive property in the stratum, and a privilege to go through the surface of the superincumbent land for the purpose of working it.

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MANSFIELD C. J. The grant of the stratum must be taken to be a grant in fee-simple. In the course of the discussion I was strongly struck with the argument used for the heir, that Lord *Coke* has in 1 *Inst.* 32. enumerated all the species of inheritance of which a woman shall be endowed: and I thought it extraordinary that no mention should be made of mines. But upon referring to the passage, it appears to be no enumeration of all the things whereof a woman shall be endowed. Nothing like it: in the 36th section, upon which this passage is a commentary, *Littleton* says, the wife shall be endowed of all lands and tenements of which her husband was seised. Lord *Coke* says not a word to explain what is land or what is a tenement, thinking the import of those terms well known in the law. But the intention of the passage is, to shew, that though all lands and tenements are subject to dower, and assignment is to be made by metes and bounds where it can, yet it is no impediment to dower that the tenements are of such a nature, as that they cannot be assigned by metes and bounds; but in those cases it shall be assigned as well as it can be, as by the third toll-dish of a mill, or the like. In the preceding chapter, which is of tenant by the curtesy, *Littleton* does not mention of what the wife must be seised; and Lord *Coke*, 29. *b.* speaks of lands only, but *Littleton*, *s.* 52., speaks of tenements. The words in both cases must receive the same exposition: and it is only necessary to see whether this species of property be land or a tenement: *Comyn*, and the other digests which have been cited, only follow the words of *Co. Litt.*, the reason of whose authority is above stated. In the case of trees there is a profit in the shade and pannage, but in the case of a mine, the working it is the only mode in which it can be enjoyed.

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A second argument was prayed on behalf of the heir, which the Court refused, thinking the case sufficiently clear.

The Court certified to the High Court of Chancery that their opinion upon the questions proposed to them, arising from the first and second statements in the case, was, that the widow of *John Hanbury* was dowable of all his mines of lead and coal, as well those which were in his own landed estates as the mines and strata of lead or lead ore and coal in the lands of other persons, which had in fact been open and wrought before his death, and wherein he had an estate of inheritance during the coverture; and that her right to be endowed of them had no dependance upon the subsequent continuance or discontinuance of working them, either by the husband in his lifetime, or by those claiming under under him since his death.

They thought too that her right of dower of such mines, &c. could not be in any respect affected by leases made by the husband during the coverture; but if any of the existing leases for years were made by the husband before marriage, then the endowment, (if made of the mines,) must be of the reversions and of the rents reserved by such leases as incident to the reversions; in which case they thought the widow would be bound so long as the demises continued, to take her share of the renders, whether pecuniary or otherwise, according to the terms of the respective reservations. They were also of opinion that the widow was not dowable of any of the mines or strata which had not been opened at all, whether in lease or not.

In assigning the dower of Mr. *Hanbury's* own lands, the sheriff must estimate the annual value of the open mines therein as part of the value of the estates of which the widow is dowable; but it was not absolutely necessary that

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that he should assign to her any of the open mines themselves, or any portions o them. The third part in value which he should assign to her might consist wholly of land set out by metes and bounds, and containing none of the open mines. Or he might include any of the mines themselves in the assignment to the widow, describing them specifically if the particular lands in which they lie should not also be assigned; but if those lands should be included in the assignment, the open mines within them might, but were not necessarily to be so described, being part of the land itself which was assigned; and as the working of open mines was not waste, the tenant in dower might work such mines for her own exclusive profit. Or the sheriff might divide the enjoyment and perception of the profits of any of the particular mines as after mentioned.

In regard to the mines and strata which Mr. *Hanbury* had in the lands of other persons, they were of opinion that it was not necessary that the sheriff should divide each of the mines or strata; but he might assign such a number of them as might amount to one-third in value of the whole, or he might proportion the enjoyment of such of them as he should think necessary, so as to give each a proper share of the whole.

If the division of an open mine could be made by metes and bounds, as lands are required to be divided without preventing the parties from having the proper enjoyment and perception of the profits, they thought that mode should be adopted; but as the property seemed to them to be incapable of a beneficial severance in that way, they thought the case analogous to some of those stated by Lord *Coke*, 1 *Inst.* 32. *a.*; wherein it is held that the sheriff may make the assignment in a special manner; and that therefore he might so proceed with respect to the mines in question. They found no authority however establishing any precise mode of dividing a mine, nor could they point out any that might

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not be attended with inconvenience; but if the sheriff was to make the assignment, they thought he might lawfully execute his duty by directing separate alternate enjoyment of the whole for short periods, proportioned to the share each had in the subject, or by giving the widow a proportion of the profits.

In answer to the last question proposed to them, they were of opinion that the widow was entitled to work for her own exclusive use the open mine within the close that had been assigned to her without any exception of the mine, for her dower of one of the estates, notwithstanding the excess arising from the omission of such exception; and inasmuch as the assignment was the act of the heir himself, being of full age at the time, they thought he had no remedy at law against the dowress for avoiding the consequences of that act. Had he been under age at the time, he might have had relief by writ of admeasurement of dower; or had the assignment been made by the sheriff in execution of a judgment in dower, the heir might have had a *scire facias* to obtain an assignment *de novo*.

REGULA GENERALIS.

IT IS ORDERED, That from henceforth, on all special arguments to be heard in this court, the paper-books shall be dilivered to the Lord Cheif Justice and the other Judges, two days (exclusive) of the day of such delivery, before the day on which the same shall have been set down for argument.

J. MANSFIELD.
S. LAWRENCE.
A. CHAMBRE.

END OF MICHAELMAS TERM.

CASES

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ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Hilary Term,

In the Forty-ninth Year of the Reign of GEORGE III.

HINDLE v. O'BRIEN.

Jan. 25.

Where usurious securities have been acted on, and the money partly paid by the borrower, the Court will not set aside a judgment and execution, but upon the terms of the Defendant repaying the principal and legal interest.

SHEPHERD Serjt. had in the last term obtained a rule *nisi* to set aside the judgment which had been signed in this case upon a warrant of attorney, and to restore the sum of 269*l*. 10*s*. 6*d*. which had been levied under an execution thereon. The Defendant had given, for various sums borrowed of the Plaintiff, bills and promissory notes, with usurious premiums. The parties at length stated a usurious account, and the Defendant, to secure the payment of the whole by instalments, gave bills payable at stated periods and a warrant of attorney, in exchange for which, the Plaintiff gave him up his original bills. Upon the Defendant's failure to pay the second instalment, the Plaintiff entered up judgment, and sued out execution.

Lens Serjt., in shewing cause, prayed that the Court would enable the Plaintiff to try the usury in an action

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at law, or refer the whole account to the prothonotary; or at least he contended, if this judgment were to be set aside, the Defendant must give back the original bills, the surrender of which was the consideration for the judgment. *Edmondson* v. *Popkin*, 1 *Bos.* 270. And the money levied ought to be paid into court, to abide the event of any action on the bills, not to be repaid to the Defendant.

Shepherd and *Onslow* Serjts. *contra*. Since the warrant of attorney is confessedly usurious, the Plaintiff is entitled to nothing more than the re-delivery of his old bill upon his restoring the money levied: the parties will then be placed in the same situation as before the last account taken. The Court will not in their discretion send the parties to the prothonotary, because the Plaintiff would be thereby placed in a much better situation than he would have been in without this corrupt judgment; and besides, no question subsists here for the prothonotary to enquire into. In the case cited the usury was denied.

HEATH J. This is an application to the equitable jurisdiction of the Court, to get rid of a warrant of attorney which is good at law. The party applying must therefore do that which is equitable. If he applies to the equity of the Court, he waives their legal jurisdiction: he cannot at once take the benefit of both.

LAWRENCE J. If the Defendant had applied upon the first giving of the warrant of attorney, he would have been entitled to set it aside, and to be put *in statu quo*. But here he has suffered several of the bills to become due, and has paid part of the money secured by them. He ought therefore to discharge the principal and legal interest.

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CHAMBRE J. There is no ground to direct an issue, the usury not being denied. But this is an application to the equitable jurisdiction of the Court, and the Court will compel the party applying, to do what is equitable; which is, to pay the money that has been really advanced, with legal interest.

It was ordered, that the judgment and executions should be set aside, and that the money which had been levied, should be paid into court, there to abide the event; and that it should be referred to the prothonotary to take an account generally of all matters between the parties, and to compute the principal and legal interest due to the Plaintiff.

PEARSON, Demandant. MAYNARD, Tenant.

Jan. 26.

In a writ of right, if the *nisi prius* clause be omitted in the writ of summons, and the knights come from a distant county, and appear at bar, the Court will not compel them to be sworn unless the Demandant will undertake to pay their expences.

It is settled that the *nisi prius* clause is properly inserted in the writ of summons.

COCKELL Serjt. on behalf of the sheriff of *Yorkshire* and four knights who had been summoned to appear at *Westminster*, and there to be sworn to make election of the grand assize between the demandant and the tenant in this cause, and who then attended at the bar, had moved, with the consent of *Shepherd* Serjt. of counsel for the tenant, that before the knights were sworn, they and the sheriff might be paid their expences of coming up to *London* from *Yorkshire*, and returning. The demandant having omitted to insert an alternative *nisi prius* clause in the writ, the summons, which they had obeyed, absolutely required their appearance at bar.

Williams Serjt. for the demandant opposed this application. Their appearance here is a duty cast upon them by the law. It is doubtful whether they would be bound to appear at the assizes, if the *nisi prius* clause had been inserted.

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inserted. In *Luke* v. *Harris*, *Bl.* 1266. *Blackstone* J. was not satisfied of the propriety of the practice, though it was in that instance allowed. Even if it is regular, the practice is of very late date, and, it cannot make the ancient course of law improper, which has prevailed for so many ages. Besides, the Court have no jurisdiction to give costs in this case, for there are no costs in the action.

HEATH J. Ever since the case of *Luke* v. *Harris* the usage has been to insert the *nisi prius* clause in the writ of summons.

LAWRENCE J. The question is, whether it is not fit and reasonable that these gentleman should be paid their expences of coming up hither, and whether, if the demandant refuses to pay them, the court will compel them to be sworn, or whether in that case, they may not take their own course, to be sworn or not, at their peril. The case of *Luke* v. *Harris* was very much debated and considered.

The Court determined that they would not compel the knights to be sworn, unless the demandant would undertake to pay so much for their expences as the prothonotary should award.

The demandant then gave the undertaking required, and the knights were sworn.

The Court refused to grant the expences of the sheriff.

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Lord DORMER v. KNIGHT.

Jan. 26.

Proviso that an annuity should cease if a lady should associate, continue to keep company with, or cohabit or criminally correspond with *J. F.* All intercourse whatever, though the most innocent, is within the terms of the deed.

COVENANT, to recover the arrears of an annuity of 800*l. per ann.* granted to the Plaintiff for the use of his sister the Defendant's wife. The Defendant pleaded another deed executed by the Plaintiff, by which it was covenanted that if the Defendant's wife should "associate, continue to keep company with, or cohabit, or "criminally correspond with *J. F.*," the annuity of 800*l.* should cease, and instead thereof the Defendant should be compellable to pay an annuity of 400*l.* only, and that she did afterwards associate with *J. F.* by which the annuity was reduced to 400*l.* The replication denied that she had associated with *J. F.* Upon the trial of this cause at the sittings after last *Michaelmas* term, before *Mansfield* C. J., several witnesses proved that Mr. *F.* had frequently called at the house, and had left his card, like any other visitor; he had sometimes been admitted; but the witnesses had never seen any improper behaviour in him, nor any appearance of levity in the lady. Upon this evidence *Shepherd* contended that he was entitled to recover the whole annuity of 800*l.*; but *Mansfield* C. J. thought it was the meaning of this deed, that there should be no communication whatever between the parties, and that if the innocent visiting sworn to had taken place, the annuity was reduced to 400*l. per annum*; and under his direction the jury gave a verdict for the arrears of the annuity of 400*l.* only.

Shepherd Serjt. now moved for a new trial, upon the ground that the damages were too small, contending that the association intended by the deed was a criminal intercourse, and stating circumstances from which he believed that upon another trial the suspicion of criminal inter-

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course even before the separation would appear to have been unfounded.

The Court were clear that this deed had received a perfectly right construction; for it appeared by the evidence, that short of criminal intercourse, Mr. *F.* was a suspected person. The words of the deed were as general as could be, and went much further than the mere exclusion of criminal cohabitation: the intention was, to put a stop to all intercourse whatever between these two persons. The receiving a man's visits whenever he chuses to call, is associating with him. The parties had chosen to express themselves in those terms, and the words must receive their common meaning and acceptation.

The Court refused the Rule.

Jan. 26.

BEVIR, Demandant. ROBBINS, Tenant. BEECH, Vouchee.

If a recovery do not pass within the term in which the *dedimus* recites the writ of summons to be returnable, it will not suffice to indorse on the renewed *dedimus* a return purporting to be made by the commissioners who returned the former writ, without having their actual signature.

COCKELL Serjt. moved that a recovery might pass under the following circumstances. A writ of *dedimus potestatem* was sued out, tested the 6th of *November*, and reciting the writ of summons to be returnable in *Michaelmas* term. Two of the commissioners named, on the 25th of *November*, within the term, signed the caption, and the return of the *dedimus*, and made the usual affidavit of taking the acknowledgment of the warrant of attorney, but the documents were not transmitted to *London* soon enough for the recovery to pass before the last day of the term. The cursitor then issued a second writ of *dedimus potestatem*, usually called a renewed writ, which was tested the 19th of *November*, and recited the writ of summons to be returnable in this term. The solicitor attended with this writ at the

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the Judges' chambers for his *allocatur*; when it appeared that no return was indorsed thereon, and upon this defect being pointed out, he soon after brought it, having a return indorsed thereon, the signature of the commissioners residing in the country who had returned the former writ, having been since subscribed to it in *London*; and it was stated to be an usual practice, when a recovery does not pass in the term in which the writ of summons is returnable, and it is intended to pass it in a subsequent term, for which the same writ of *dedimus potestatem* will not suffice, that in order to save fees to the parties, the deputy cursitor takes back the first writ, which is then filed with the clerk of the king's fines, and issues a new writ, upon which the solicitor employed endorses a return purporting to be made by the commissioners who returned the first writ. The cursitor then annexes the second writ, so returned, to the warrant of attorney and affidavit, and thereupon the recovery has passed.

The Court refused to sanction so irregular a proceeding, and *Cockell*

Took nothing by his motion.

RUCKER v. PALSGRAVE.

Jan. 26.

Payment of money into Court to the amount of a partial loss upon a valued policy is not an admission of a total loss.

THIS was an action upon a valued policy of insurance. The Defendant paid into court 30*l* *per cent.* Upon the trial of this cause at *Guildhall* before *Mansfield* C. J., *Shepherd* Serjt., for the Plaintiff, contended, that as the contract admitted the value, and as the payment of money into court admitted the contract, the Defendant had made an admission, which furnished at least a *primâ facie* case for the Plaintiff, of a total loss to the

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RUCKER v. PALSGRAVE.

the amount insured; and that it was incumbent on the Defendant to shew that the loss was less than the whole value in the policy. *Mansfield* C. J. was of a contrary opinion, and the Plaintiff, having no other evidence, was nonsuited.

Shepherd now moved to set aside the nonsuit, and enter a verdict for the Plaintiff for the whole amount of the value in the policy, or at least that the Plaintiff might have the benefit of a new trial.

The Court were unanimous that the Defendant's rule was merely an admission that a loss of 30*l. per cent.* had been sustained, and no more, and refused the application.

Jan. 27.

PATON v. WINTER and Another.

If upon a bill being presented for acceptance, the payee alters it as to the time of payment, and accepts it so altered, he vacates the bill as against the drawer and indorsers.

But if the holder acquiesces in such alteration and acceptance, it is a good bill as between the holder and acceptor.

The keeping the bill, and presenting it for payment at the deferred period, is proof of such acquiescence.

And the holder cannot afterwards maintain an action on the case against the acceptor, for thereby destroying the bill.

THIS was a special action upon the case, in which the declaration stated that the Plaintiff was lawfully possessed of a bill of exchange drawn by *T. Wells* upon the Defendants for forty-six pounds six shillings and sixpence, and payable one month after the date thereof to his own order, and which bill had been duly indorsed and delivered by *T. Wells* to *R. Stafford*, and by *R. Stafford* to the Plaintiff, and the Plaintiff was lawfully entitled to receive the money therein specified when it should become due, according to the tenor therof; that he caused the bill to be presented to and left with the Defendants for their acceptance, and that they, contriving to injure him, and to render the bill void and invalid,

and

and to deprive him of the security of, and means of compelling payment thereof from the drawer and indorser in the event of the bill being and remaining unpaid by the Defendants, afterwards, and whilst the bill so left for acceptance was in their custody, wrongfully and without the licence or consent, and against the will of the Plaintiff, or of the said *T. Wells*, or *R. Stafford*, defaced, erased, altered, and made it void, by then and there, after the bill had been issued, negociated, and put into circulation, erasing the word one, and substituting for it the word two, thereby erasing and altering the period at which the bill was made payable, from one month to two months; whereby the period for payment was altered and retarded, and the bill rendered null and void: he further averred, that although the Defendants did accept the bill so altered and defaced, at such altered and enlarged period, they did not pay the same, either at the expiration of the period at which the bill became due according to its original tenor thereof, or at the expiration of the period, at which they so accepted the same, or at any other period; whereupon the Plaintiff required *T. Wells* and *R. Stafford* respectively to pay the same, and averred that they refused on account of such defacing and alteration and avoidance; and that the Plaintiff had not any means of compelling either *Wells* or *Stafford* to pay the same; and that he had lost the money therein specified, and all value for the same. There was also a count in trover.

Upon the trial of this cause at *Guildhall* before *Chambre* J. at the sittings after last *Trinity* term, the facts alleged in the declaration were proved, with this addition, that the Plaintiff received the bill after the alteration and acceptance, and lodged it with his bankers, who presented it for payment at the end of the two months, when it was refused by all the parties. It did not appear whether

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the Plaintiff knew of the alteration or not. The jury found a verdict for the Plaintiff upon the special count, and for the Defendant upon the count in trover, with liberty for the Defendant to move to set it aside, and enter a nonsuit, upon the ground that the action could not be supported.

Accordingly *Runnington* Serjt. having in *Michaelmas* term last obtained a rule *nisi*,

Shepherd Serjt. now shewed cause. He admitted that a drawee may make a partial or limitted acceptance, or may make as it were, a new bill, with the consent of all the parties. But it did not therefore follow that the Defendant should not be liable to make good the damage which he had occasioned to the holder of a bill, by altering it without such consent. In this case no such consent could be presumed, for the acceptor returned the bill without apprising the holder of the alteration he had made, and the bill was laid by without observation until the time of presenting it for payment; when the drawer properly refused to pay it, because it was not the bill which he had issued. This want of notice had deprived the holder of his remedy against the drawer and indorsers; to whom he might immediately have resorted, if he had been informed that the acceptor would not pay the bill till the end of two months.

Runnington, in support of the rule, contended, 1. that this action, which he said was *primæ impressionis*, could not be sustained; inasmuch as the Defendant had not destroyed the bill by his alteration of it; but on the contrary, was liable upon his acceptance of it; and that therefore the Plaintiff had his action on that contract, and no other remedy. A drawee was not bound to accept according to the terms in which the bill was originally

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nally drawn, but he might partially accept it for less than the whole amount, *Wegerstoffe* v. *Keene*, 1 *Str*. 214. and *Petit* v. *Benson*, *Comb*. 452. or conditionally in certain events, *Mason* v. *Hunt*, 1 *Doug*. 297. *Julian* v. *Shobrooke*, 2 *Wils*. 9. *Smith* v. *Abbott*, 2 *Str*. 1152. or to pay at a time future, *Walker* v. *Atwood*, 11 *Mod*. 190. If, as between the holder, and the drawer and indorsers, the bill was destroyed by the alteration, the holder might have refused to receive the bill with this acceptance on it; but the acceptor thereby entered into a new contract, which he was bound to execute, and to which the holder had become party, by receiving and keeping the bill thus accepted. The case of *Price* v. *Shute*, mentioned in *Molloy*, *Lib*. 2. *c*. 10. *s*. 28. is a decision fully in point: for there, a bill drawn payable on the 1st of *January*, was accepted to be paid on the 1st of *March*: the holder struck out the first of *March*, and put in the 1st of *January*; and when it was due according to that date, he presented it for payment, which the acceptor refused; whereupon the payee struck out the 1st of *January*, and restored the 1st of *March*, and recovered in an action brought upon that acceptance, as the case is understood by *Buller* J. *Master* v. *Miller*, 4 *T. R*. 336. So, in this case, whatever defence this alteration might have afforded to the drawer; yet as between these parties, the bill, after the acquiescence of the Plaintiff, continued valid, and payable at the deferred period.

The Court were of opinion that the Plaintiff, by keeping the bill, had acceded to the alteration, and had discharged the drawer: but upon the other point, *Lawrence* J. observed, that in *Master* v. *Miller*, three Judges against *Buller* J. thought there must have been some mistake in *Molloy*'s account of that decision, or that the case was not law; and that Lord *Kenyon* C. J. held that the case did not conflict with *Master* v. *Miller*, because there

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the acceptance only was altered, but there was no alteration of the bill itself: in *Master* v. *Miller* it was held that an alteration made in the bill vitiated the bill against all parties.

Rule absolute (*a*).

(*a*) It was not suggested upon the argument, whether a new stamp was necessary for the bill thus altered.

Jan. 31.

STEEL *v.* CAMPBELL.

If the *English* notice at the foot of common process require the Defendant to appear at a return day in an impossible year, it is not such an irregularity for which the Court will set aside the proceedings.

BEST Serjt. had obtained a rule *nisi* to set aside the proceedings on account of an irregularity in the *English* notice at the foot of the common process. The writ was tested on the 28th of *November* in the 49th year of his majesty's reign, and was returnable in 8 days of *St. Hilary*; but the notice required the Defendant to appear on the 20th day of *January* 1808.

Shepherd Serjt. now shewed cause. In the case of *Doe* v. *Kightley*, 7 *T. R.* 63. a notice to quit at *Lady-day*, which will be in the year 1795, being delivered after that day, was held a good notice to quit at *Lady-day*, 1796. *Elliot* v. *Parrot*, *Barnes*, 425. To the process was subscribed a notice to appear on the 26th of *June*, not saying in what year, and it was held sufficient: the naming an impossible year is equivalent to the naming no year; and it appears by the teste, which is after the 20th of *January*, and return day of the writ, taken together, that the day of appearance must be in 1809.

Best Serjt., in support of the rule, observed that the st. 5 *G.* 2. *c.* 27. was express that no process should be good without an *English* notice at the foot to explain the

writ.

writ, and for want of such a notice this writ was bad; for it was not competent to call the writ in aid to explain the notice. This notice could not, as the statute designed it should, inform an ignorant Defendant when he was to appear: the notice to appear in *June* only omitted to state the year, but this tended to mislead, by stating a wrong year. The notice to quit is regulated by no statute.

The Court observed that as the notice was, to appear at the return of the writ, which was tested subsequently to *January* 1808, no man could understand it to require an appearance in *January* 1808. The Defendant must know that his appearance was required at a future, and not a past day. It was therefore an immaterial mistake, which could do no harm, for what other day could occur to him than the 20th of *January* 1809? it was quite impossible that the party should not understand that to be the year intended.

Rule discharged.

FOWELL *v.* LEO.

Feb. 3.

A Defendant will be permitted to pay into court, to abide the event of the cause, a sufficient sum to cover the debt and costs, instead of giving bail.

THE bail in this case having been twice rejected, and an attachment obtained against the sheriff, *Shepherd* Serjt., on behalf of the Defendant, moved that in lieu of putting in bail in this action, he might instantly pay into court the sum of 60*l.* being the sum for which he was held to bail, and a further sufficient sum, as security for the costs, there to abide the event of the cause, and that he might thereupon enter a common appearance.

The Court granted the application, upon the Defendant's depositing 40*l.* to secure the costs; first paying the

costs

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costs of the two oppositions to the bail, and of the application for the attachment, which were claimed by *Best* Serjt. for the Plaintiff.

Feb. 4.

PEACOCK *v.* JEFFERY.

Taking the person in execution does not satisfy the debt so as to extinguish it. But it may still become the subject of a set-off. In a cross action, the Defendant may on motion set off the debt against a judgment for a greater sum, and the Court will stay proceedings thereon.

THE Defendant in this case had taken the Plaintiff in execution upon a judgment obtained in the Court of King's Bench for 205*l*. The Plaintiff having now arrested him for a debt of 11*l*., *Best* Serjt. had on a former day obtained, on behalf of the Defendant, a rule *nisi* that all further proceedings might be stayed, upon his remitting to the Plaintiff the amount of the debt for which he was held to bail in this action, from the amount of the judgment which he had obtained against the Plaintiff, and entering up satisfaction *pro tanto*.

Vaughan Serjt. contended, in answer to this application, that the Plaintiff had satisfied the judgment by the highest satisfaction known in the law, the being personally taken in execution.

Best Serjt., in support of the rule, argued, that execution alone is not a perfect satisfaction. *Blumfield's* case, 5 *Co.* 87. *b.* In the case of *Foster* v. *Jackson, Hob.* 59., which cites 33 *H.* 6. 47. *Hilarie's* case, it was held to be no satisfaction in a foreign plea. This case therefore proves that taking the Defendant in execution in one cause, does not preclude but that in another cause the Plaintiff may get at his debt. The same thing now prayed for was allowed to be done on the application of the Defendant in custody, in the case of *Vaughan* v. *Davies*, 2 *H. Bl.* 440. The being in custody, and being afterwards discharged, is equivalent to payment of the debt

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debt, but the merely being in custody is no payment. The prisoner is in custody that he may be compelled to pay. The Court will not here drive the Defendant to plead a set-off, because it involves the heavy expence of proceeding to trial in order to establish it.

The Court required that the Defendant should allow the further sum of 5*l.* for the costs of this cause, since he admitted the Plaintiff's right of action; and, with this addition, made the

Rule absolute.

BRAMWELL and Another *v.* FARMER and Another, Bail of LEFFMAN.

Feb. 4.

If bail enter into a recognizance, although they are excepted to and never justify, they are liable.

SHEPHERD Serjt. had obtained a rule *nisi* to stay the proceedings in this action, and to enter an *exoneretur* on the bail recognizance upon which it was brought. The Plaintiff having commenced an action on a judgment obtained against *Leffman* for 94*l.*, the Defendants were put in as special bail. On the 9th of *May*, *Leffman* obtained a rule *nisi* to stay proceedings pending error brought on the judgment, he giving judgment in that action, with a stay of execution until the original judgment should be affirmed. This rule was made absolute on the 12th. On the 10th of *May* the Plaintiff excepted to the bail. The original judgment being affirmed, an execution issued, to which the sheriff returned *nulla bona*; and *Leffman* having soon after become a bankrupt, and absconded, the Plaintiff proceeded against the bail.

Clayton Serjt. shewed cause. He contended that the bail were not discharged by the exception. *Fulk* v. *Bourke*, 1 *Bl.* 462., and the Court would exercise its discretion,

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cretion whether they should now be struck out of the recognizance or not. He also contended that the exception had been waived by making absolute the rule to stay proceedings.

Shepherd Serjt. *contra*. The rule is no waiver of the exception, for the motion to stay proceedings was made before the bail were excepted to. From the time of the exception they considered themselves as discharged, and as being no bail, which according to the principle of *Fulk* v. *Bourke* they were entitled to do.

The Court held that the Plaintiff after exception might consider the bail as a nullity; he might have taken an assignment of the bail-bond, or have obtained an attachment against the sheriff. But that the bail had nothing to do with the exception, or the waiver of it: they entered into a recognizance, and thereby incurred the obligation to perform it.

Rule discharged with costs.

Feb. 4.

KAYE *v.* WAGHORN.

Accord and satisfaction made before breach of a covenant, cannot be pleaded in bar of an action on the covenant.

THE Plaintiff declared against the Defendant, who had conveyed to him certain freehold premises, upon a covenant of the Defendant that he and his wife would levy a fine upon request. The Defendant pleaded in bar, that after the executing the conveyance and before the request made, it was agreed between the parties that the Defendant should execute his writing obligatory in the penal sum of 178*l.* 10*s.* conditioned for his, and his heirs, executors, adminstrators and assigns, indemnifying the Plaintiff against any claim of dower of his wife in respect of the premises, and that the Plaintiff should accept

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cept the same in lieu and in satisfaction of the said covenant, and in respect of the said supposed breach thereof; and the Defendant averred that afterwards, and before the request made to levy a fine, he did execute his writing obligatory so conditioned, and the Plaintiff accepted the same in lieu and in satisfaction and in discharge of the covenant.

To this plea the Plaintiff demurred; and assigned for causes that the covenant was an executory covenant, and yet the Defendant had pleaded an accord and satisfaction thereto before any breach thereof, and had alleged such accord and satisfaction to have taken place before the breach; and that the supposed accord and satisfaction was not certain, nor executed, inasmuch as the Plaintiff was not necessarily entitled to recover or have execution for the full penalty of the writing obligatory, but such damages only as he might prove to have suffered by reason of the breach of the condition, which damages must be ascertained by a jury of the country, by reason of the form of the condition; and that the said writing obligatory was an instrument of the same nature as that on which this action was brought, and did not give the Plaintiff a better or more summary remedy for any damage he might sustain by reason of the breach of the covenant or of the condition; and gave the Plaintiff a remedy against the Defendant only, and not against his wife if she should survive him; and that the writing obligatory was not a defeasance of the covenant, nor an indemnity against all damages which the Plaintiff might sustain by reason of the breach of the covenant, but against the claim of dower only. The Defendant joined in demurrer.

Best Serjt. would have argued in support of the plea, upon the authority of a case in 2 *Roll. Rep.* 187. *Rabbetts* v. *Stoker*; but the Court observed that was a very loose report, and upon the authorities of *Alden* v. *Blague, Cro. Jac.*

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Jac. 99. *Blake's* case, 6 *Co.* 43. *b.* *Covill* v. *Geffery*, 2 *Ro. Rep.* 96. *Snow* v. *Franklin*, 1 *Lutw.* 358. and *Palm.* 110. they were clear that a covenant under seal, not broken, could not be discharged by parol agreement. It was not *dissolvi eo ligamine quo ligatur*. Besides, the covenant by a man and his wife to levy a fine, involved considerations much more extensive than an indemnity against the wife's dower.

Judgment for the Plaintiff.

Vaughan Serjt. was to have argued for the Plaintiff.

Feb. 4.

BARNWELL *v.* HARRIS.

A purchaser is not compellable to accept a title to premises, formerly subject to an incumbrance, the discharge of which is shewn only by presumption.
A leasehold was sold, subject to a ground-rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by any existing deed, but only by the acceptance of a mesne landlord, and presumption: held that the purchaser was not bound to accept the title.
Sixty years possession is an unobjectionable title to a fee simple.

THIS was an action brought to recover back a deposit of 27*l.* 10*s.* paid upon the purchase of a certain leasehold house, under conditions of sale, which stated that the lot was subject to the yearly ground-rent of two pounds: the Plaintiff contended that the premises appeared to be subject to a much larger rent. Upon the trial of this cause at the sittings in *Middlesex*, after last *Trinity* term, before *Mansfield* C. J., it appeared that the premises, with other houses, were built upon land demised by *Reynolds*, in the year 1764, at 28*l.* rent; and that *Heady*, who was said, but not proved, to have his estate, had for more than 20 years past received the separate rent of 2*l.* from the occupiers of this house. *Mansfield* C. J. thought this evidence sufficient to induce the jury to consider whether the rent had been apportioned by the act of the landlord. They found however a verdict for the Plaintiff.

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Shepherd Serjt. having in last term obtained a rule *nisi* to set aside this verdict and enter a nonsuit, upon the ground that there was sufficient room to presume an apportionment, was now called on to support his rule. He contended that the goodness of the title was to be tried precisely on the same grounds as if the rent were contested between the landlord and tenant; and there, although perhaps the rent could not be apportioned but by deed, it was not necessary the apportionment should be proved by the production of the deed; but after 20 years acceptance of the lesser rent, the deed would be presumed. A purchaser was compellable to accept the title, although there was no deed subsisting to evince the apportionment; in like manner as he could be compelled to accept a title to a fee simple under a possession of 60 years, although no title-deeds should be produced. The question here was, whether in fact and in law these premises were liable to a greater ground-rent than the 2*l.* If the landlord had distrained upon this lot, and had avowed for the 28*l.* rent, and the tenant had pleaded an apportionment by a deed which had been lost by time and accident, the issue would have been found for him upon this evidence.

MANSFIELD C. J. The question is whether it be not the duty of the vendor to give the the purchaser a complete formal discharge of all the further rent that the house was ever liable to: for if not, the purchaser is put to the necessity of finding evidence to make this apportionment appear. Must he then risk the loss of his apportionment for want of evidence? A court of equity would not decree a specific performance in this case, unless the Plaintiff could procure the ground-landlord to apportion the rent by joining in an assignment of the lease, in which assignment the apportioned rent should appear.

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Heath J. It is a technical rule among conveyancers to approve a possession of 60 years, as a good title to a fee simple. An apportionment may be presumed here, but is it not such a presumption as may be rebutted by contrary evidence? The apportionment is an improbable thing, for if a house should fall down, and if it were not worth the tenant's while to build it up, the landlord who has consented to an apportionment must lose his remedy for the rent *pro tanto*.

Chambre J. The question here is not what may be presumed, but whether a purchaser is compellable to accept a purchase, where his title rests only on presumption, which may be rebutted by other evidence: and in this case there is much to be rebutted; for a landlord who can come upon the whole for his rent, would be very unwise to restrict himself to the security of a part only.

Rule discharged.

Best Serjt. for the Plaintiff.

Feb. 6.

Gibson and Another, v. Macbride.

It is matter of favor to change the venue to a county palatine, And where the design is to oppress the Plaintiff, the Court will not grant the indulgence.

Cockell Serjt. having obtanied a rule *nisi*, to change the venue from *London* to *Lancaster*, *Clayton* Serjt. shewed cause upon an affidavit, which stated that the action was brought for the price of goods, to the amount of 8*l.* only, sold to the Defendant at *Liverpool*, by the agency of a person who had since become wholly resident in *London*, and who must with much inconvenience to himself, and at an expence to the Plaintiff much greater than the whole price of the goods, attend at *Lancaster* solely for the purpose of giving evidence

dence in this cause; that the deponent believed there was no defence to the action on the merits, and the motion was made only to deter the Plaintiff from proceeding. The Court would therefore avail themselves of an omission in the Defendant's rule, who had neglected to offer the usual terms of not assigning for error the want of an original.

Cockell, contrà, maintained that he was entitled in law to his rule.

The Court unanimously held that it was a matter of favor to permit the venue to be changed into a county palatine, and the practice of granting this indulgence had been introduced only within a few years past; and upon the facts disclosed, they

Discharged the rule.

WELLER *v.* ROBINSON.

Feb. 6.

If a Defendant's place of abode be unknown, application must be made to the Court that affixing the declaration in the office may be deemed good service.

UPON the discussion of a rule *nisi* which *Best* Serjt. had obtained to set aside an interlocutory judgment, and the subsequent proceedings in this cause, and to permit the Defendant to plead and proceed to trial, and requiring the sheriff to pay into court the sum levied in execution, to abide the event of the cause, it appeared that the Defendant had been served with common process, while he was on board an *East-Indiaman*, at *Gravesend*, that he soon after sailed to the *East Indies*, and the further proceedings took place in his absence; that the declaration had been no otherwise served, than by fixing it up in the office, it being sworn that the Plaintiff's attorney

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torney had no knowledge of the Defendant's last place of abode. The rule of court of *Michaelmas* term 1 *Geo.* 2. does not provide for the case where the Defendant's last place of abode is not known; and the officers stated that a practice had prevailed, of serving the declaration, in that case, only by affixing it in the office.

LAWRENCE J. If the general rule for the service be relaxed, it should be on the special circumstances of each particular case, upon a disclosure of which the Court of King's Bench in many cases has permitted a service of this sort to avail. It appears indeed that this practice has crept in, but I can find no rule by which it is authorized, and the Court ought not to countenance it, nor can such service be good, except under a rule obtained for that purpose upon a statement of the facts; the present application must therefore prevail on the terms prayed for.

CHAMBRE J. I am of the same opinion. We have a general rule which ought not to be departed from without the special permission of the Court.

Rule absolute.

MANSFIELD C. J. and HEATH J. were absent.

Shepherd Serjt. for the Plaintiff. *Best* for the Defendant.

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GRANT *v.* GUNNER and Another.

Feb. 4.

There can be no approver in derogation of a right of common of turbary.

At common law the lord might approve against common of pasture appendant.

THE Plaintiff declared that the Defendants broke and entered a certain close of the Plaintiff in the parish of *Farnborough*, in the county of *Southampton*, and dug up, prostrated, and levelled a certain mound or fence of the Plaintiff, there then erected, and separating and dividing the close from a certain common called *Farnborough* common, contiguous thereto, and with the materials of the said mound or fence filled up and levelled a ditch of the Plaintiff before then made in the said close, contiguous to the said mound or fence, and laid and left open the said close to the common, and kept and continued the same so laid and left open until the suing out of the Plaintiff's writ. The Defendants pleaded, 1st. Not guilty. 2dly. As to the breaking and entering the close, and digging up, pulling down, prostrating and levelling the mound or fence, and filling up and levelling the ditch, and laying open the said close, that at the time when, &c. there was and immemorially had been a certain large common called *Farnborough* common, consisting of divers, (to wit) 500, acres of land, within and parcel of the manor of *Farnborough*; of which common the close in which, &c. during all the said time had been and still was parcel. The plea then stated a grant to the Defendant *Mary Gunner* in fee simple, of a certain copyhold messuage and land within the manor, and averred a custom that the tenants thereof had immemorially had common of turbary, (to wit), peat and turf, in and upon *Farnborough* common, to be had and taken for his and their necessary fuel, to be burnt and consumed in the said messuage, every year, and at all times of the year, as occasion required, as belonging and appertaining to the said customary tenement with the appurtenances;

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and that the Defendant *Mary Gunner* demised the same tenement for a year to *Ann Gunner*, who entered and was possessed thereof; and she being so possessed, because the said mound or fence had been wrongfully erected, put, and placed in and upon the common, parcel, &c. and at the time when, &c. was there wrongfully standing and being, and wrongfully separated and divided the said close, parcel of the common, from the the residue thereof: and the said ditch had been wrongfully made and dug in and upon the common, and at the same time when, &c. so continued, so that the said *Ann* could not have and enjoy her said common of turbary in and upon the said common in so ample a manner as she then and there ought to have done, the Defendants, as the servants of the said *Ann*, and by her command, at the time when, &c. broke and entered the said close, and dug up, pulled down, prostrated, and levelled the said mound or fence, and with the materials thereof filled up, and levelled the ditch, and laid open the said close, parcel of the common, to the residue thereof, as they lawfully might, &c. The Defendants thirdly pleaded a right of common of pasture for cattle levant and couchant on the same tenement. The replication to the second plea admitted the facts stated in it, but pleaded a conveyance by lease and release from *Valentine Henry Wilmot*, the lord of the manor of *Farnborough*, to the Plaintiff, of the close in which, &c. thereby described as part of the waste ground within the manor of *Farnborough*, (that is to say, of the said waste or common in the second plea mentioned,) with the appurtenances, to have and to hold the said close in which, &c. with the appurtenances, unto and to the use of the Plaintiff his heirs and assigns for ever, to the intent and purpose that the Plaintiff might and should inclose the said close in which, &c. and improve the same in such manner as the said *Valentine Henry Wilmot*, as lord of the manor, could or might, under any law then in force, inclose

close

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close and improve the same. By virtue of which indenture, and by force of the statute, the Plaintiff became seised in his demesne as of fee; and being so seised, afterwards, and before the time when, &c. did inclose the close in which, &c. then being part of the common called *Farnborough* common, from the residue thereof, by the said mound or fence, to hold the same place in which, &c. with the appurtenances, to him the Plaintiff his heirs and assigns for ever, in severalty, to the only proper use and behoof of him the Plaintiff his heirs and assigns for ever; and did then approve the same, there being then left by him the Plaintiff, and remaining in the residue of the common, sufficient common of turbary, to wit, peat and turf, to be had and taken for the necessary fuel of the said *Ann*, to be burnt and consumed in the said messuage, every year, and at all times in the year, as occasion might require, and for the necessary fuel of all other persons then having and using right of common of turbary in and upon the common, every year, and at all times of the year, as occasion might require; together with free ingress, and egress, way, and passage for them and every of them, and with their horses, carts, and carriages, to have and take such necessary fuel, and to have and use their said right of common of turbary in and upon all the residue of the common, at all times, as occasion might require; by means whereof, and by force of the statute in such case made, and notwithstanding any thing by the Defendants in their 2d plea alledged, the Plaintiff, before the time when, &c., became, and then was, and from thenceforth had been, and still was seised in his demesne as of fee, of and in the close in which, &c., with the appurtenances in severalty by itself, and divided from the residue of the common; and he being so seised thereof, the Defendants at the said time when, &c. of their own wrong committed the said several trespasses. The Plaintiff replied to the 3d plea of common

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of pasture, the same conveyance of the close, and his seisin and approver thereof; and he averred, that in approving the said close in which, &c. he then left, and there did then remain in the residue of the common, sufficient common of pasture for all commonable cattle levant and couchant on the said customary tenement, every year, and at all times of the year, as occasion might require, and for all the commonable cattle of all other persons whatsoever having and using right of common of pasture in and upon the said common, every year, and at all times of the year, as occasion might require, together with free ingress, egress, way, and passage, for them and every of them, and their and every of their commonable cattle, to have and use their right of common of pasture in and upon the residue of the common at all times as occasion might require; whereby he became seised in severalty, (as in the former replication;) and that the Defendants of their own wrong committed the said several trespasses.

The Defendants demurred to the replication to the second plea, and rejoined to the replication to the third plea, traversing the sufficiency of the common of pasture, and ingress, &c. and tendered issue upon this fact.

The Plaintiff joined in demurrer and issue. The issue was tried at the *Winchester Lammas* assizes 1808, when a verdict was found for the Plaintiff upon the sufficiency of the common of pasture, with one shilling damages.

Shepherd Serjt. on a former day in this term argued in support of the demurrer. The question, whether the lord hath a right to approve the wastes of his manor against common of turbary, is still *res integra*. There is no direct decision upon the subject; all the modern cases which touch on it, only decide that a right of turbary will

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will not preclude the lord from approving against common of pasture, where it has been the tenant's object to assert the latter right: and the plea of turbary has been only collateral. The lord had, by the common law, no right whatsoever to approve: his right is founded on the words of the statute of *Merton*, which are, "Also because many great men of *England*, which have enfeoffed knights and their freeholders of small tenements in their great manors, have complained that they cannot make their profit of the residue of their manors, as of wastes, woods, and pastures, whereas the same feoffees have sufficient pasture, as much as belongeth to their tenements; it is provided and granted, that whenever such feoffees do bring an assize of *novel disseissin* for their common of pasture, and it is knowledged before the justicers, that they have as much pasture as sufficeth to their tenements, and that they have free egress and regress from their tenement unto the pasture; then let them be contented therewith, and they on whom it was complained shall go quit of as much as they have made their profit of their lands, wastes, woods, and pastures." It is manifest from the expression "It is provided and granted," that before this statute the lord had no right to approve at all. The statute of *Westminster* the second, 13 *Ed.* 1. c. 46., after reciting "that by the statute of *Merton* it was granted that lords might approve, notwithstanding the contradiction of their tenants," and "forasmuch as *no mention was made between neighbour and neighbours*, many lords of wastes, woods, and pastures, had been hindered theretofore by the contradiction of neighbours, having sufficient pasture," orders, "that the statute of *Merton*, provided between the lord and his tenant, thenceforth should hold place between lords of wastes, woods, and pastures, and their neighbours, saving sufficient pasture to their "tenants

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" tenants and neighbours, so that the lords of such " wastes, woods, and pastures, may make approvement " of the residue." It is difficult for the Plaintiff to contend that these statutes were made in affirmance of the common law, when the latter recites that lords were hindered from approving against neighbours, forasmuch as in the former statute no mention was made of that case. Therefore it must be concluded that these statutes first gave the right to approve: and if so, then it is clear that the only right which they create is to approve against common of pasture. In the 2 *Inst*. 87. Lord *Coke* says, " Throughout all this statute, (of *Merton*,) *pasture* " and *communia pasturæ*, is named; so as this statute of " approvements doth not extend to common of pischary, " of turbary, of estovers, or the like;" and in p. 85. " *Quod commodum suum facere non potuerunt*. Hereby it " appeareth that the lord could not approve by the order " of the common law, because the common issued out of " the whole waste, and of every part thereof; and yet " see *Tr*. 6 *H*. 3. where the lord approved two acres, " and left sufficient, the tenant brought an assize, and " the special matter being found, the Plaintiff *retraxit se*." But whether the right to approve subsisted at common law or not, it was merely the right to approve against common of pasture, not against estrovers, pischary, or turbary. For if these statutes were made in affirmance of the common law, it must be inferred that they together declare all the rights which the lord had; for it being found that the first statute had not sufficiently declared them, the second was made fifty years afterwards to supply the deficiency; yet the latter extended only to the right of approver against common of pasture. It is laid down in several cases that the lord had no right to approve at all before these statutes. 1 *Siderf*. 106. *Geo*. v. *Cother*. Case by a commoner for digging pits, and spreading gravel upon the waste, by which he lost his common

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common. The Defendant pleaded that he was lord of the soil, and dug for coals, doing as little damage as possible, and leaving sufficient pasture. *Wyndham* J. held that the lord could not dig pits in the common, into which, perhaps, the beasts of the commoner might fall; for the statute intended another manner of approver, namely, by inclosure; and he said that before this statute the lord could not approve at all. In the case of *Fawcett* v. *Strickland*, *Willes*, 57. S. C. *Comyn*, 578, though the tenant was wrong, because he pulled down the lord's fences in order to exercise his common of pasture, *Willes* C. J. and the Court, were clearly of opinion that the lord could not approve against common of turbary. *Willes* there says, "The common of turbary is "quite out of the case. For though a lord cannot by "virtue of the statute of *Merton* inclose and approve "against common of turbary, yet where there is com-"mon of turbary, and common of pasture in the same "waste, the common of turbary will not hinder the lord "from inclosing against the common of pasture, for "they are two distinct rights. But if indeed by such "inclosure this common (of pischary,) or their common "of estovers, were affected, or they were interrupted "in the enjoyment of either of these rights, they might "certainly bring their action, and the lord, to be sure, "could not justify such inclosure in prejudice of these "rights. And so may the Plaintiff in the present case "if he be interrupted in his right of turbary: but by his "present action he does not complain of any such inter-"ruption, nor does he insist upon any such matter in his "replication," which was, a prescription in right of a certain messuage and 40 acres of land, for common of pasture on *Blewcaster* common, for all commonable cattle levant and couchant upon the same tenements, and also (in the same replication,) common of turbary in the said waste, for his necessary fuel to be burnt and con-

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sumed in the said messuage, as appurtenant thereto, and that the Plaintiff put his cattle, levant and couchant, on his tenements, into *that part of the waste so inclosed*, to eat the grass there growing, and to use his common of pasture, and that the Defendants of their own wrong chased them out. Here the replication did not maintain the action, because it did not prove any injury to have been done in driving out the Plaintiff's commonable cattle, and the Court gave judgment on the demurrer for the Defendant. The case of *Shakespear* v. *Peppin*, 6 *Term Rep.* 741. was decided upon the authority of *Fawcett* v. *Strickland*. That was replevin, and avowry that the place where, was inclosed and separated from *Walton* common, and was the Defendant's freehold. The Plaintiff pleaded his common of pasture in right of a customary tenement. The replication stated an approver, leaving sufficient common of pasture. The Plaintiff rejoined a custom to dig sand in the common, *as common of pasture there*; and the Defendant surrejoined, that there was sufficient sand left: the Plaintiff generally demurred. The judgment was for the Defendant, as it seems, because the rejoinder was held a departure from the plea; for this is a plain proof that the Court did not consider that the lord could approve against common of turbary, that if they had they must have said, whether the Plaintiff claims common of turbary or common of pasture, since it is admitted by the pleadings that sufficient of both is left, he cannot have his action. But *Willes* C. J. anxiously distinguishes between the two, that he may prevent the inference that the lord could approve against right of turbary. In 2 *Inst.* 474. Lord *Coke* says, indeed, that "by the "common law the lord might always approve against any "that had common appendant," and in the case of *Proctor* v. *Mallorie*, 1 *Ro. Rep.* 365. the statute of *Merton* is said to be only in affirmance of the common law: but it is not to be discovered by the report of that case, how the point

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point arose, and it seems to be an extrajudicial discussion. The proof there given, namely, that the writ of admeasurement, *quod habet plura animalia quam debeat* in respect of his frank tenement, lay at common law, is not conclusive; for it does not follow that the writ must necessarily be sued out only for the purpose of the lord's approver: it might lie for lord or tenant, for the benefit of that tenant, or of all, against any other tenant who disproportionately overstocked. No case is now extant in which it has been held that the lord might approve at common law; the two statutes afford a presumption that he could not; and if not, it is quite clear he cannot now do it. But if those statutes were only in affirmance of the common law, still they give no approver against common of turbary. An argument against the reasonableness of the approver contended for, is to be found in the nature of these respective common rights. Common of pasture is of a thing annually renewing. The number of acres which will afford in one year sufficient pasture for the tenants' cattle, levant and couchant on a particular tenement, will, *communibus anis*, afford sufficient for the same quantity of cattle in all subsequent times, so that if a sufficiency of pasture be left at the time of the approver, (the fertility of the tenements remaining the same,) it will always be a sufficiency. But turbary is an annihilation of the subject-matter. If peat renews, which certainly does not take place in all instances, and it is doubtful whether it does in any, it renews too slowly to repair the necessary consumption.

Lens Serjt. *contrà*. The arguments that have been adduced tend only to shew that the lord's right to approve has not yet been determined. But from the nature of the thing and the analogy of the law, it appears that there is equally the same right to approve in the one case and in the other. *Willes* C. J intimates that the right subsists,

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sists, if properly excercised; for he says, "the lord, to be "sure, in such case could not inclose *in prejudice of those* "*rights*; and so may the Plaintiff in the present case, "(*Fawcett* v. *Strickland*,) bring his action, if he be in-"terrupted in the enjoyment of his common of tur-"bary:" that is, if either his pasture or his turbary be injured by the approver, he may in either case equally bring his action. It is very strongly to be inferred from that case that the right of turbary does not render the inclosure unlawful. No authority stated proves that there was no approver at common law. It is true that approver cannot be excercised by virtue of the statute of *Merton*, in any case but in that of pasture; but though that statute first provided, that if a sufficiency were not left, the approvement should be apportioned by the discretion and oath of the assize, 7 *Ed.* 3. 67. before which, the whole must have been laid open, if enough pasture had not been left, it does not at all follow that there was no approver in any other cases, or before that statute. Lord *Coke*, 2 *Inst.* 87. refers to the case in *Tr.* 6 *H.* 3. as a decision that there was approver at common law; and (*a*) in *Proctor* v. *Mallorie*, he says, "for so are divers cases "in

(*a*) So Sir *Anthony Fitzherbert* C. J., in his reading on the statute *Extenta manerii*, intitled *Surueyenge*, edit. 1767, p. 3. "*Quot campi sunt in dominico*, "it must nedes be taken of "feldes, that be in tyllage or "plowing, but it wolde be "understand, whether the "demeyne landes lye in the "commyn feldes among other "mens lands, or in the feldes "by themself.——Where-"fore the acres are to be "praysed accordyng; and if "they be great flattes or fur-"longes in the common fieldes "it is at the lordes pleasure to "enclose them, and keep them "in tillage or pasture, so that "no nother man have com-"myn therein." And again, p. 16. "As for "all errable landes, medowes, "leise, and pastures, the lordes "may improue themself by "course of the common law; "for the statute speaketh no-"thing but of waste groundes." And again, p. 19. "So it "was of oldetyme that all the "landes, medowes, and pas-"tures, lay open and unclosed. "And than was theyr tene-"mentes

"in the reign of *Hen.* 3. which was before the statutes, "and this appears by the writ *quod permittat habere tan-* "*tam pasturam:* and Lord *Bacon*, Chancellor, particu- "larly agreed with him in all that he said." The expression in 2 *Inst.* 87. is not adverse to this position; for Lord *Coke* is there speaking only of the statute of *Merton*. *F. N. B.* 4to ed. 287. *Quod permittat, H.* "And the "rule in the register is, that the writ of *quod permittat* "lieth of common of pasture, turbary, pischary and rea- "sonable estovers." In 2 *Wils.* 59. *Cope* v. *Marshall*, it is said *arguendo* that approver was by common law. The cases of *Fawcett* v. *Strickland*, and *Shakespear* v. *Peppin*, although they only incidentally touched the point, generated an opinion in the profession that the right of approver was by the common law, and it is so laid down by *Buller* J. in 2 *T. R.* 392. *n. Duberley* v. *Page*. It is plain, since the tenant's right is a qualified right, and consists in a mere permission to take his profit, that all other uses of the land which do not interfere therewith, are still preserved to the lord. As to the distinction between the nature of turbary and pasture, that species of turf which consists of the roots of heath, and grass, and the other vegetables which grow on the surface, is well known to renew within a very few years, and the peat

"mentes moche better cheape "than they be nowe, for the most "part of the lordes haue enclosed "theyr demeyn landes, and mea- "dowes, and kepe them in seuer- "altie, so that theyr tenauntes "haue no commyn with them "therein." (Which implies that they intercommoned over all the demesnes, so long as they lay open.) And afterwards, "Moores, hethes, "and wastes, go in lyke manner as "the herbage of the townes, for "the lord's tenantes have commen "in all suche out groundes with "their cattel, &c." From these passages it seems that before the inclosure of such demesne lands, the tenants must have had common appendant over such demesne lands, as well as over the rest of the open lands, meadows, and pastures of the township in which they lay interspersed, but that nevertheless the lord might at all times by common law approve his demesnes against this species of common.

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also renews, though slowly. But is unnecessary to consider that, for the question upon an approvement always is, whether there were a sufficiency left at the time of the approvement made; for the tenant must declare upon the actual injury done to himself. 8 *Ed.* 3. 39. Without considering whether the supply will be perpetual, if to a common intent, and common apprehension, sufficient is left at the time of the approvement, that is enough. If the sufficiency were disputed, the Defendants should have taken issue on it, but they have admitted upon the pleadings, the sufficiency to satisfy their rights such as they are in relation to this tenement. [*Chambre* J. observed, that the value of turbary chiefly depended upon its contiguity to the messuage, not on the sufficiency of quantity, and that circumstance rendered it extremely improbable that the common law should make the right of approver against turbary to depend on the sufficiency.] If the contiguity is destroyed, that is evidence to support the issue of insufficiency. But the value of pasture, also, in great measure depends upon the contiguity. If the pasture left is so distant from the tenant's lands that he is damnified, that would be evidence to shew, that, as to him, there was not a sufficiency left.

Shepherd Serjt. in reply. There can be no approver against turbary, because there is no measure by which to try the sufficiency of what is left. If the tenant were not left destitute of fuel for the present winter, a jury must find a present sufficiency; but if the inclosure left none for the next winter, it would nevertheless be an absolute destruction of the right, not indeed as it was to be exercised at the moment, but of the right as it was to be exercised for ever after. So, in common of pischary, a partial inclosure would destroy the right, for the commoner could not draw his net. As to the *quod permittat*, the existence of a remedy for the tenant, if he is injured, does not at all indicate the extent of his rights.

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It is not to be inferred from the language of *Willes* C. J. that he thought there was a right to approve against turbary. On the contrary, he says, that "probably their "common of estovers may be the better for such inclo-"sure," which clearly contemplates the tenant's entry to take the wood, notwithstanding the inclosure. His meaning is, that the act of the lord is not to be complained of, unless it be in derogation of the tenant's profit; but here, the lord asserts his right to derogate, so as he leaves sufficient: and of the sufficiency no measure can be assigned.

LAWRENCE J. At common law the lord might perhaps inclose against common appendant, which was not an express grant, but was exercised where the lord granted arable land to be held of himself: but it does not follow that he could approve against his own grant. Now must not common of turbary necessarily be by grant? [*Mansfield* C. J. acc.] Then Lord *Coke's* expressions are reconciled. If there be common of turbary by grant, to issue out of all and every part of the waste, the lord cannot, to be sure, in derogation of his own grant, approve against the right of turbary.

Cur. adv. vult.

Lens on this day prayed that the case might be again argued by *Williams* Serjt. for the Plaintiff.

MANSFIELD C. J. We should be happy to hear it argued again if there were any hope of new light being introduced upon the subject: but no case since the statute of *Merton* is to be found, in which it has been held that the lord may approve against the right of common of turbary. If the law be not against the approver, all the reasoning in the case of *Fawcett* v. *Strickland* is

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absurd. Chief Baron *Comyn*, and all the books, recognize Lord *Coke*'s doctrine without a doubt. *Shakespear* v. *Peppin* recognizes the authority of *Fawcett* v. *Strickland*, and that case, throughout the whole argument, takes it for granted that the law is so. The universally received opinion of the profession ever since I have been in the law, has been, that there can be no approver against common of turbary. The argument for the Defendant is a very strong one, that pasture is a thing annually renewing, and that turbary is not. The turf which is used in the neighbourhood from which this case comes, is the furface of the common, pared off with the heath. As to peat, the substance of morasses, which is in some places called turf, there may be a vast quantity in a moor at a distance from home, and a smaller quantity near home; and it might be very convenient for the lord to inclose that part of the land which lies nearer home; but it would be monstrous, if the lord could compel his tenants to go to a great distance, perhaps to the other side of the mountain, to fetch home their fuel. But it is said the right to approve against common of turbary, may subsist with the limitation of leaving both fuel enough and conveniently situated. No one ever heard of a plea that the lord had left pasture, not only sufficient, but equally convenient, nor is it necessary so to plead it. What Lord *Coke* says of approving at common law against common appendant, is only applicable to common of pasture.

HEATH J. On this side of *Westminster-hall* the law has always been so considered; and during the time I was at the bar, I have given opinions to that effect.

Williams

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Williams disclaming the hope of adducing any authorities to the contrary effect,

Judgment was given for the Defendant (*a*).

(*a*) Acc. *Fitzherbert. Surueyenge* 17. " *Item, inquirend. est* " *utrum dominus de residuo bosco-* " *rum predictorum forinsicorum* " *dare possit, et quantum valet talis* " *donatio vel venditio per annum.* " It is also to be enquered, Whe- " the lorde may gyve or selle the " residue of his forren woodes " aforesayed, and what suche gyfte " or sale is worth by the yere. " This letter is playne enough, and " as me semeth no doubte but the " lord may giue or selle the residue " of the sayde woddes or wastes. " *Except that a manne haue com-* " *men of estovers.* But what that gyft " or sale is worth is to be under- " stand and knowen, and as me " semeth the donee or the byour " shall be in lyke cause as the lord " should haue ben, if he had not " gyven it nor sold it. Than the " lord hath improued himself of as " moche woddes and wastes as he " can lawfully, and when he hath " gyuen or sold the resydue of that " he cannot improue hymself of it. " In like manner the donee nor the " byoure can nat improue them " selfe of any part thereof. For " they can nat be in no better case " than he of whom they had it."

And in p. 15., speaking of approver under the statute of *Merton*, he says, " Commen in gross is, " where the lord hath granted by " his dede commen of pasture to a " straunger. Nowe the lord may " nat improue hymself of any par- " cell, *for it is contrary to his* " *graunt*, though there be sufficient " of commen." And in p. 21. " Moores, hethes, and wastes, go " in lyke manner as the herbage " of the townes, for the lordes te- " nauntes haue common in all such " out groundes with their cattel. " but they shall haue *no wodde,* " *thornes, turues*, gorse, ferne, and " such other, *but by custom*, or *els* " *special words in his chartour.*" So that this author must have considered turbary to come within the reason of common in gross.

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If a ship has liberty to touch at a port, it is no deviation to take in merchandize during her allowed stay there, if she does not by means thereof exceed the period allowed for her remaining there.

If liberty be given to touch at a port, the contract not defining for what purpose, but a communication having been made to the underwriter, that the ship was to touch for a purpose of trade, it shall be intended as a liberty to touch for that purpose.

THIS was an action upon an insurance, made on goods from *Madeira* to *Santos*, with liberty to touch at the *Cape de Verd* Islands. The cause was tried before *Mansfield* C. J. at the *Guildhall* Sittings after last *Trinity* term, upon admissions, which stated that the Plaintiff had effected a former policy to the amount of 1400*l.* upon the ship *De Sangano*, and 300*l.* on her cargo, at and from *Lisbon* to *Madeira* and *Santos* in *South America*, with liberty to change the property at *Madeira*; that *Camacho*, *Belford* and Co., the owners, by a letter written from *Lisbon* and addressed to the Plaintiff, had requested him to "alter the insurance effected on the *De* "*Sangano*, instead of *Madeira* to *Santos*, *Madeira*, the "*Cape de Verd* Islands, *where she would take salt*, and "*Santos*, to the same amount on the brig, and to the "amount of 1500*l.* on goods." In consequence of this letter the Plaintiff procured to be indorsed on the policy a memorandum, by which, "in consideration of one "guinea *per cent.*, the underwriters who signed it, "agreed to permit the vessel to touch at one port in the "*Cape de Verd* Islands, to take in salt." The Plaintiff also, soon after, effected the further policy, upon which this action was brought, for 1200*l.* on goods by the *De Sangano* at and from *Madeira* to *Santos*, with liberty to *touch* at the *Cape de Verd* Islands. The policy also contained liberty to touch and stay at any ports or places whatsoever without being deemed a deviation. The loss the Plaintiff's interest, and the Defendant's subscription of the policy, were admitted. The ship sailed from *Lisbon*, and took in an additional cargo at *Madeira*, from whence she sailed, bound for *Santos*. In the course of the voyage

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she touched at *Bona Vista*, one of the *Cape de Verd* Islands, where she remained several days, and loaded a considerable quantity of salt there as merchandise. The Defendant contended that this was an equivalent to a general trading, and was therefore a deviation, which increased the risk and avoided the policy; for that though the memorandum indorsed on the former policy gave liberty to touch and take in salt, the policy now sued on gave only liberty to touch, not to touch and trade. A witness proved, and the jury especially found, that the letter above mentioned was communicated to the agent, who signed the policy for the Defendant. It was contended that this letter was not admissible evidence, but *Mansfield* C. J. received it, and a verdict was found for the Plaintiff, with liberty to move to set it aside, and to enter a nonsuit.

Accordingly, *Best* Serjt., having in *Michaelmas* term last obtained a rule *nisi*,

Shepherd and *Marshall* Serjts. on a former day in this term shewed cause. They contended that when a ship is in port, or in any place where she may lawfully be, the taking in a further cargo will not discharge the underwriters. In the case of *Sheriff* v. *Potts*, 5 *Esp*. 96. *Marshall*, 2 edit. 188., where the ship was insured, with liberty to discharge part of her cargo at *Lisbon*, Lord *Ellenborough* C. J. held, indeed, that this permission did not authorize the taking in any new cargo, and that it was a deviation to do so. And in the case of *Stitt* v. *Wardell*, 1 *Esp*. 810. *Park*, 388. 6 edit. upon an insurance at and from *Whitehaven* to *St. Michael's*, with liberty for the ship to touch and stay at any place or places whatsoever, and particularly at *Cork*, in her passage out, Lord *Kenyon* C. J. held that those terms did not comprehend a liberty to trade. But neither of those cases ever came under

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the review of the Court, and so far as they can be supposed to decide that all trading in a port where a ship touches, is a deviation, (for unloading and loading are equally acts of trading and deviation), they have since been overruled in the case of *Raine* v. *Bell*, 1 *East*, 195., where they were much considered. That case underwent a very full discussion, and the Court there held, that " if " a ship touch at a port which is allowed, and stay there " for any reason which is allowable within the intent " and meaning of the policy, and no additional risk to " the underwriters be incurred by her trading there " during such her stay for an allowed or justifiable " cause," she may take in " goods without being guilty of a deviation." In that case the ship went into *Gibraltar*, not under the permission to touch and stay, for it was out of her course, but under a necessity, through want of provisions, which makes the case still the stronger. In the case of *Driscol* v. *Passmore*, which is reported in 1 *Bos. & Pull.* 200. on other points, the vessel took in an anchor and cable for the purpose of trading, and sold it: and in an action in the King's Bench, Lord *Kenyon* C. J. held, it avoided the policy; but on another action being brought in this court, *Eyre* C. J. held that it did not; and the point was never afterwards mooted. The vessel could not have touched at these islands under the general permission which he had to touch and stay, because they were not in the direct course of her voyage; but the liberty to touch there, brought them within the course of her voyage, and she then was entitled to stay as long there, and for the same purposes, as at any other port on her voyage. Nothing therefore in the general law of insurance made it unlawful to take on board this salt, which has not been found by the jury to increase the risk or delay the ship's departure. The evidence of the letter has not the effect of altering or controlling the written contract, and was properly admitted.

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Underwriters are presumed to be conversant with the practice of the voyage they insure, and it is well understood, though it was not proved, that the only purpose for which any ship can touch on these islands, is, to take in salt. Since therefore the vessel might under this policy touch and stay there, the taking in goods would be no deviation, because the underwriter had notice by the general course of the trade that the taking in of those goods was the very purpose of touching there. But here the letter communicated to the underwriter was express notice to him of the design of her touching, and of the practice of the voyage, and therefore the conclusion is the more forcible, that the Defendant assented to it as part of the risk insured. It would render policies wholly insecure, and occasion great inconvenience to the trade of the country, if the taking a single additional bale of goods on board, in a port where a ship might lawfully touch, should be deemed a deviation. [*Mansfield* C. J. observed that the cases of *Stitt* v. *Wardell*, and *Sheriff* v. *Potts*, were certainly much shaken by the subsequent case of *Raine* v. *Bell*; but that neither of them governed the presnt question.

Best, contrà. The communication of the letter can make no difference; for the question merely is, What was the contract between the parties? And although the concealment of any material facts would have vitiated the contract, on the ground of fraud, it does not follow that every fact which is disclosed becomes parcel of the contract. But, secondly, the evidence of this letter was improperly received. Policies must be governed by the same rules of evidence as other contracts; and parol testimony is not admissible to enlarge them. Not only does no general usage subsist of touching at these islands for the purposes of trade, but it is evident from their situation that vessels go thither, not for any pur-

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poses of trade, but for the purpose of taking in provisions and water only. And the sole effect of the liberty to touch there was this, that the vessel might lawfully sail from *Madeira* with a less store of water and provisions than would suffice for her whole voyage, in the contemplation of taking in a further supply at the *Cape de Verd*, which, without this clause, she could not lawfully take in, even at a port situated in the course of her voyage unless it were either the custom of the voyage to do so, as in *Salisbury* v. *Townson*, *Park*, 6 edit. 411., which is not found to be the case here, or unless the ship having been at first completely victualled for the whole distance, unforeseen circumstances had rendered it necessary for her to get further supplies; and the liberty to stay, is, to stay so long as shall be necessary for these authorized purposes. And the distinction between the liberty to touch and stay, and the liberty to touch, stay, and trade, is this, that the former clause does not authorize the taking in of any additional cargo: where that is intended, it is usual to ask permission to touch, stay, and trade, as in the case of *Grant* v. *Paxton*, *post* 465. The authorities of *Stitt* v. *Wardell*, and *Sheriff* v. *Potts*, strongly favor this interpretation of the clause; and the case of *Bell* v. *Raine* is so far from overruling, that it supports this construction: for it considers the two former cases as law, and proceeds upon the express ground that the jury had found that no delay was occasioned, which has not been found in the present case. [*Mansfield* C. J. The case of *Stitt* v. *Wardell* did not at all depend upon the words of the policy. *Dublin* was not a port in the ship's passage out, and it was found that she did not stay the longer for discharging her coals. The act complained of in *Sheriff* v. *Potts* did not detain the vessel half an hour. If while a ship is necessarily detained in harbour for a lawful purpose, an act is done, by taking in or putting out part of her cargo, which does not

not delay her, nor in the least degree affect her voyage, it seems hard to say that is a deviation. I cannot distinguish the case of *Rain* v. *Bell* from the others. There the ship took in dollars while staying in the port for a legal purpose.]

Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court.

After recapitulating the facts of the case, he observed: The question which has been made, both at the trial and upon the argument, is simply this, Whether the ship having liberty to touch at the *Cape de Verd* islands, without any reason assigned for it in the policy, the staying there a little time, and taking in this salt, without any proof that the loss was at all occasioned thereby, is to be considered as a trading which vacates the policy, because, as it is said, the memorandum gave only liberty to touch, not to touch and trade? It is doubtful, nor can I find it any where defined, what is the precise meaning of "liberty to touch," as contradistinguished from the meaning of "liberty to touch and stay." No case decides this difficulty, though there must be some difference between the two phrases: but the time of staying in both instances is perfectly undefined; and no case decides how long, or for what purposes, a ship may stay under the licence of these clauses. I have been always extremely averse to receive parol evidence to vary or explain a written contract; but under the circumstances of this case the Court is of opinion that the letter was admissible evidence; and that it explains the word "touch;" and since it was communicated to the underwriters, they must have known for what purpose this word was introduced into the policy. They must have known that the ship was to trade there, and that the policy contemplated this act. It was assumed in the

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course of the argument, that the taking in salt was equivalent to a general trading: but that is not so; for the purposes of a general trading, it might have been necessary to unload all the cargo, and consume much time: it does not necessarily follow that much time was consumed in taking in salt. It is not therefore to be concluded that the "liberty to touch," authorizes a general trading. Among the cases on this subject, which are all collected in *Park*, 6th ed. 388. is that of *Stitt* v. *Wardell*, which has been cited in the argument. Lord *Kenyon* does not there at all define what is the meaning of the "liberty "to touch and stay," but expresses his opinion that if that breaking bulk had happened at *Cork*, where the ship was entitled to touch, instead of in *Dublin* harbour, the policy would equally have been avoided. But as this was a sudden answer to a sudden question put by the Plaintiff's counsel, what would have happened if the ship had gone into *Cork*, it is not a comment entitled to have much weight, as an explanation of the term "liberty to touch and stay." I wish his lordship had more fully considered it. In the case of *Gregory* v. *Christie*, *B. R.* *Trin.* 24 *Geo.* 3. *Park*, 67., Lord *Mansfield* C. J. says, "the policy in question differs from others; because it "contains a permission to *trade*, as well as to *touch and* "*stay*, at any ports or places, which is not usual in po- "licies of this nature; for in general the only permit "them to *touch and stay*, which words can only be in- "tended to give a permission so to do if *necessity obliges* "*them*." This cannot be the true construction. The clause is not required for that purpose; for every ship, without any memorandum for that purpose, has liberty to do what is necessary, in order for the preservation of the vessel and the lives of those on board her; as to take in provisions to save the crew from starving, or to prevent her from sinking by going into port to be repaired. Such acts, though done without the sanction of these words

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words, are no deviation. I know not who was the author of that note, and perhaps it may have been incorrectly taken. The meaning of these words then has never been defined. It was truly said, that if a general custom had been proved, for ships from *Madeira* to *Santos* to call at the *Cape de Verd islands*, to take in salt, it would have been a sufficient answer to the objection which imputes a deviation. And upon what principle? Because, if the underwriters know by the general custom of the trade, that the touching at those islands is for the purpose of taking in salt, the assured are entitled to do it. If then the underwriter knows the same thing by means of an express communication of the purpose of touching, which is in this instance proved to have been made, it is the same thing as if he had notice by the general usage of the trade. He knows then by this letter that the ship was to go to the *Cape de Verd* for salt. The letter is not made use of to vary, or contradict the policy; it only shews that the underwriters knew the purpose of going there; it therefore shews that there was no deviation from the course of the voyage, intended and insured, and this construction is not at all inconsistent with any decided case. I do not go into the merits. No doubt the difficulty arose from a want of precision in the broker. He thought the first policy was sufficiently cleared up by the indorsed memorandum, and that after the communication to the underwriters, the other policy would have the same effect.

Rule discharged.

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Elmore v. Stone.

If a man bargains for the purchase of goods, and desires the vendor to keep them in his possession for an especial purpose for the vendee, and the vendor accepts the order, this is a sufficient delivery of the goods within the statute of frauds.

It is no objection to a constructive delivery of goods, that it is made by words, parcel of the parol contract of sale.

THIS was an action brought to recover the price of two horses, which it was contended had been sold to the Defendant. The declaration contained one count, upon a bargain and sale, and another upon a sale and delivery. Upon the trial of this cause at the *Middlesex* sittings in *Trinity* term last, before *Mansfield* C. J., it appeared that the Plaintiff, who kept a livery stable, and dealt in horses, having demanded 180 guineas for these, the Defendant after offering a less price, which was rejected, at length sent word that "the horses were his, "but that as he had neither servant nor stable, the "Plaintiff must keep them at livery for him." The Plaintiff, upon this, removed them out of his sale stable into another stable. *Lens* Serjt. for the Defendant contended, that as this was a bargain and sale of goods of grater value than 10*l.*, a note in writing was necessary to be proved, because there was no sufficient delivery. Such a constructive delivery as this, would not avail, he said, to take the case out of the statute. *Mansfield* C. J. was of opinion that there was a sufficient delivery, but reserved the point; and the jury found a verdict for the Plaintiff.

On the following day *Lens* obtained a rule *nisi* to set aside the verdict and enter a nonsuit, upon the objection abovementioned. And on a subsequent day in the same term

Best Serjt. shewed cause. He conteded, 1st, that the transfer of the horses from the stable where the Plaintiff's horses were exposed to sale, and where these at first stood, to a livery stable, where they stood at the expence and risk of the Defendant, was equivalent to an actual delivery.

delivery. He might have after that time have maintained trover for them, and if he had died, they would have belonged to his executors. The delivery was complete, so far as any delivery was capable of taking place, consistently with the disposition the Defendant choose to make of them. 2. If this was not an actual delivery, it is one of those cases to which the statute of frauds does not apply, because an actual delivery is impossible: no delivery was intended, or could be made here, without defeating the Defendant's purpose of keeping the horses at livery with the Plaintiff, and therefore none was necessary.

Lens, contrà. The statute, in requiring a delivery, intended that there should be some distinct substantive act independent of the bargain, and capable of proof, to corroborate the parol account of the bargain. But there is nothing here distinct from the parol contract, to confirm it, and the only evidence of the delivery is found in the terms of the contract itself. In the cases of a sale of heavy goods in a warehouse, or of hay, or the like, it has indeed been held that corporal delivery is not necessary, but that the delivery of the key, or other symbolical or constructive delivery, is sufficient. *Chaplin* v. *Rogers*, 1 *East*, 194. But nothing here has been done towards a delivery, except the request that the horses might stand at livery, therefore the whole still rests in parol. It might with equal propriety be contended, that in the common occurrence, where goods are ordered in a shop, and left till called for, that is a delivery. [*Heath* J. observed, that if the goods were weighed out, or measured, that would be a sufficient delivery.] The second argument resolved itself into the first. If goods are not capable of an actual delivery, a constructive delivery is sufficient. But in the present case there is neither an actual nor a constructive delivery. It is material that the Defendant

never

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MANSFIELD C. J. now delivered judgment.

The objection made to this verdict was the want of a memorandum in writing of the sale, and of a delivery. I thought at the trial that there was no need of a memorandum in writing, because of the direction given, that the horses should stand at livery. They were in fact put into another stable, but that is wholly immaterial. It was afterwards argued that this was not a sufficient delivery, but upon consideration we think that the horses were completely the horses of the Defendant, and that when they stood at the Plaintiff's stables, they were in effect in the Defendant's possession. They are many cases of constructive delivery, where the price of goods may be recovered on a count for goods sold and delivered, instead of a count for goods bargained and sold. A common case is that of goods at a wharf, or in a warehouse, where the usual practice is, that the key of the warehouse is delivered, or a note is given addressed to the wharfinger, who in consequence makes a new entry of the goods in the name of the vendee, although no transfer of the local situation or actual possession takes place. Thus in the present case, after the Defendant had said that the horses must stand at livery, and the Plaintiff had accepted the order, it made no difference whether they stood at livery at the vendor's stable, or whether they had been taken away and put in some other stable. The Plaintiff possessed them from that time, not as owner of the horses, but as any other livery stable keeper might have them to keep. Under many events it might appear hard, if the Plaintiff should not continue to have a lien upon the horses which were in his own possession.

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possession, so long as the price remained unpaid; but it was for him to consider that, before he made his agreement. After he had assented to keep the horses at livery, they would, on the decease of the Plaintiff, have become general assets: and so, if he had become bankrupt, they would have gone to his assignees. The Defendant could not have retained them, although he had not received the price. Consequently the rule must be

Discharged.

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WARD v. WELLS.

If an attesting witness has set out to leave the kingdom, his absence is sufficiently accounted for, although in fact his vessel may unexpectedly have been beaten back into an *English* port by contrary winds, just at the time of the trial.

THIS was an action brought upon a promissory note. Upon the trial before *Mansfield* C. J. at the sittings at *Westminster*, in this term, it appeared that the note had been attested by a person named *Collins*, the son of a man of fortune, who had been residing for a while in the house of the Plaintiff's attorney, and in the course of that residence had attested this note in his presence. The attorney swore that he had enquired for him in many places within a year past, and could not hear of him. Another witness stated, that four days before the trial he enquired for *Collins* at the house of his father, and was informed by his elder brother, that he believed him to be in *Spain*, as he had set out for that country about two months before, and had not yet returned. *Vaughan* Serjt. for the Defendant, contending that the absence of the attesting witness was not yet sufficiently accounted for, the father of *Collins* was called who stated that he had received a letter from his son, dated six days before the trial, from *Falmouth*, informing him that his vessel had sailed for *Spain*, but had been driven back by stress of weather; he expected however to sail again immediately: at the time of the inquires

above

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above mentioned, the elder brother had not been apprised of the receipt of this letter. *Mansfield* C. J. permitted the note to be read, and refused to reserve the point. The Plaintiff obtained a verdict.

Vaughan now moved that the verdict might be set aside and a nonsuit entered, or that a new trial might be had. *Prince* v. *Blackburn*, 2 *East*, 250. was the first case in which the old rule was relaxed, and perhaps that case went too far, but in the present instance the witness was within the reach of process.

The Court mentioned the case of *Crosby* v. *Percy*, *ante* 364. and held, that if the circumstance of a witness being abroad dispenses with the necessity of producing him, there was no pretence for the present motion. Unquestionably the Plaintiff's attorney thought the attesting witness out of the reach of process, and as to all persons in *England*, he was in *Spain*. When the previous inquiries were made, the elder brother did not know to the contrary, and the father did not at the time of the trial know that his son had not actually sailed again.

Rule refused.

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GRANT v. PAXTON. *Feb.* 9.

A policy upon a homeward voyage from *India*, upon goods at and from a foreign port of loading, until the ship's arrival in *London*, beginning the adventure upon the *said* goods from the *loading* thereof at the foreign port of loading, and so should continue upon the goods, until the same should be discharged; was held to attach only on the particular cargo taken in at the first port of loading. Though the insurance was, to all or any ports and places whatsoever beyond the *Cape of Good Hope*, in port, and at sea, in all places, at all times, and in all services, with liberty to proceed to, touch and stay at any ports or places whatsoever for any purpose whatsoever.

But upon an insurance on an *India* voyage out and home, the policy being equally extensive as that above stated, and containing the additional words, and *forwards and backwards at sea*, until the ship's arrival at her *last* station of discharge, though it purported literally to be on the said goods, the Court held it must by necessary implication apply to all goods put on board in the course of the voyage.

Forwards and backwards means from port to port in the course of the voyage, not from *Europe* to *Asia* and from *Asia* to *Europe*.

Upon an insurance on an *East India* voyage, the underwriters are bound to know the course of the *East India* Company's charter-parties and trade, and that the ship's destination is liable to be changed after the policy is effected.

And if the company permit the voyage of a chartered ship to be altered, though it is at the request and partly for the benefit of the assured, the altered voyage continues protected by the policy.

THIS action was brought upon a policy effected upon goods, by the *Brunswick*, as interest might appear; to pay average upon each species of goods, at and from *China* to all or any ports or places whatsoever and wheresoever in the *East Indies, Persia*, or elsewhere beyond the *Cape of Good Hope*, in port, and at sea, in all places, at all times, and in all services, until the ship's safe arrival at *London*; with liberty to seek for, join, and exchange convoys; beginning the adventure upon the *said* goods and merchandizes from *the loading thereof* on board the *said* ship *at China*, including the risk in craft from the shore to the ship, and to continue until the said ship, with all her ordnance, &c. and goods and merchandizes whatsoever, should be arrived at *London*, including the risk in craft from the ship to the shore, and upon the goods and merchandizes, until the same should be discharged and safely landed; and it was stipulated that it should be

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lawful for the *said ship*, &c. in that voyage to proceed and sail to, and touch, and stay at any ports or places whatsoever, for any purpose whatsoever, without being deemed a deviation. The declaration averred that a large quantity of goods was loaded on board at *China*, to be carried on the voyage insured; that the ship sailed, and proceeded in the course of the *said* voyage to *Bombay*, and that while she was there, the *said* goods were unloaded and taken out of the ship, and in lieu thereof *other* goods, while the ship remained at *Bombay* in the course of the said voyage, were put on board her, to be carried on the further prosecution of the *said voyage*; that she afterwards sailed from *Bombay* in the further prosecution of the *said voyage*, and was captured with the said *last mentioned goods* on board. This cause was tried before *Mansfield* C. J. and a special jury, at *Guildhall*, at the Sittings after *Trinity* term 1807. The facts proved were, that the *Brunswick*, of which the Plaintiff was part owner, had, in *October* 1803, been chartered in the usual terms of the *East India* Company charter-parties, for a voyage to *China* and back, and on any other service whatsoever, as the said Company, or any of their governors, presidents, or agents, authorized thereto by the Court of Directors for the time being, or any committee of the Company, should require or direct; that the ship sailed from *China*, with a cargo of tea, some part of which belonged to the Plaintiff, as his private adventure, and was the subject of this insurance. That she soon afterwards sprung a leak, which rendered it necessary for her to go into *Bombay*, where she delivered the undamaged part of the company's goods to be carried to *England* on board of the *Worcester* and *Skelton Castle*, two ships which were then lying there: and the Plaintiff, by permission of the company, forwarded his private adventure towards *England* by the *Bridgewater*, and insured it for that voyage by a fresh policy, the underwriters upon which afterwards

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wards paid him for a total loss sustained by the capture of that ship in the course of her homeward passage. When the *Brunswick* was repaired, the governor in council at *Bombay*, upon the application of the Plaintiff, permitted her to return to the port of *Canton* in *China* for the purpose of receiving another cargo of tea on account of the company, stipulating that the company should not be charged with any expence on account of demurrage, deviation or detention, or other costs and charges whatever by reason of the *Brunswick* proceeding to *China* to take in another cargo, but the same should be in all respects, as if originally laden on board the same ship in the terms of the charter-party. The Plaintiff loaded the *Brunswick* on his own account with cotton, and sailed for *China*; and upon this second voyage, the ship was, with her cargo, captured by a *French* squadron; and the principal object of this action was to recover as for a total loss upon that event. The only defence important to mention here was, that the second voyage from *Bombay* to *China* was not within the terms of the policy, which, it was contended, applied only to the goods first loaded on board in *China*, for that those goods were to be delivered in *London*; although power was given to sail with them any where; that the policy was satisfied by the protection of the same goods when they were shifted to the *Bridgewater*, and did not attach upon the goods put on board at *Bombay*. The Plaintiff on the other hand contended that this was the common form of *East India* policies, and though the insurance was expressed to be from the loading of the *said* goods in *China*, till the delivery of the *said* goods at *London*, the usage and understanding of the trade was, that the risk should cover all the trading in the whole course of the voyage between the time of loading at *Canton* and the time of the ship's arrival in *London*. The Plaintiffs referred to the case of *Grant* v. *Delacour*, which arose in

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consequence of the loss of the same ship and cargo, but upon another policy. That was "at and from *London* to "all parts and places on this side and on the other side of "the *Cape of Good Hope*, forwards and backwards, at sea, "at all times, on all services, and in all ports and places, "until the ship's safe arrival back again at her last station "of discharge at *Blackwall* or *Deptford*, upon goods in the "*Brunswick*, as interest might appear, beginning the ad- "venture from the loading thereof on board the said ship "at *London*, and so should continue until the said ship with "all her ordnance and goods and merchandizes whatso- "ever, should be arrived as above, and back again at her "last station of discharge at *Blackwall* or *Deptford*. That "cause was tried at the *Guildhall* sittings after *Trinity* term "1806 before *Mansfield* C. J. The defence chiefly relied "on, was, that the loss occurred, not upon a voyage per- "formed in the service of the *East India* company, but in "a voyage undertaken by their permission indeed, as it ap- "peared, but at the request, and for the sole benefit of the "Plaintiff. *Mansfield* C. J. was thereof opinion, that the "policy extended to all voyages performed by the *Bruns-* "*wick* under the company's authority, for whose benefit "soever they were undertaken, because the owner has no "control over a ship during the time for which it was "chartered in the *East India* company's service; and the "jury found a verdict for the Plaintiff.

"*Lens*, for the Defendant, in the following term ob- "tained a rule *nisi* to set aside the verdict, and to have a "new trial, upon the ground that there was no instance of "such a retrograde voyage having taken place under an "*East India* charter-party, and it therefore could not be, "and was not within the contemplation of the parties to "insure, and that notwithstanding the underwriters might "be responsible upon any voyage performed by the orders "of the company, though unforeseen at the time of ef- "fecting the policy, yet that in this instance the interest

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" of the company in the ship was suspended during the " performance of this voyage. *Mansfield* C. J. observed, " that no particular voyage was in contemplation; the " insurers engaged by this policy to protect the ship in any " voyage which should be undertaken in that part of the " world: this voyage had been undertaken lawfully, and " was within the policy; and there was no difference be- " tween the direction and the permission of the *East India* " company; and he saw no reason to take the voyage out " of the words of the policy. *Rooke* J. said, that if the " insurers did not like to insure such voyages, they might " except them in future policies. The case was argued " on a subsequent day in that term by

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" *Shepherd* and *Best* for the Plaintiffs, and *Lens* and " *Bayley* for the Defendants, and the Court 26 Nov. 1804.

" Discharged the Rule."

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It was contended for the Plaintiff, that that decision governed the principal case. But *Mansfield* C. J. thought that the present policy attached only upon the specific goods shipped in *China*, upon the voyage from *China* to *London*, and directed a nonsuit, with liberty to move to enter a verdict for the Plaintiff, if the Court should be of opinion that he ought to recover.

Best Serjt. in the ensuing *Michaelmas* term obtained a rule *nisi*, and the case was twice argued; first in *Hilary* term 1808 by *Bayley* Serjt. for the Defendant, and *Shepherd* and *Best* Serjts. for the Plaintiff, and again in *Trinity* term in the same year by *Lens* and *Marshall* Serjts. for the Defendant, and *Shepherd* and *Best* for the Plaintiff. The Defendant's counsel first insisted, as they had done in the case cited, that this voyage was not covered by the policy, because it was not undertaken by the command and in the service of the East India company; [but the Court clearly held that their former decision had put that question at rest; and that the only point here was, whe-

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ther this cargo was protected by the terms of the policy. The Defendant's counsel then distinguished this case from that *Grant* v. *Delacour*. There the policy was on a voyage out and home, and upon goods of all sorts; and the parties necessarily intended to trade in the course of the voyage, and therefore contemplated a change of the goods; consequently the policy applied to all the goods that should be successively shipped in the course of the voyage, and the terms used were large enough to embrace every possible circumstance of cargo: therefore though every cargo of goods which was put on board within the compass of that voyage was held to be covered by the policy, no necessity requires the same construction to be applied to this, which differs so materially from the other, that the contrast makes that case a strong authority for the Defendant. This is an insurance on a single definite voyage from *China* to *London*, and upon that voyage only was the premium calculated. The insurance attached on the specific goods purchased in *China*, and adhered to them till their loss or arrival at *London*, in whatever vessel they might come. Upon the capture of the *Bridgewater* with these goods on board, if the Plaintiff could have shewn that it was either necessary or prudent to shift them to that vessel, he might have recovered for them on this policy, and it was wholly unnecessary for him to effect a second. The underwriters who have paid that loss may now recover a contribution from the first underwriters. *Plantamour* v. *Staples*, *Mich.* 22 *G.* 3. *B. R.* 1 *T. R.* 611. *n.* That was an insurance on any kind of goods in the ship *Duras*, at and from *Marseilles* to *Madeira* and all parts and places where and whatsover in the *East Indies*, and *Persia*, or elsewhere beyond the *Cape of Good Hope*, from port to port, and fom place to place, and during her stay and trade to all ports and places, until her safe arrival back at her last port of discharge in *France*. The *Duras* being lost on the outward voyage,

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part of the goods was saved and forwarded in another ship to the Plaintiffs' agents at *Pondicherry*, who sold them, and invested the proceeds in *Indian* produce, which they shipped for *France* by the *Pere de Famille*. This ship in the course of her voyage becoming unfit to proceed for *Europe*, the goods were put on board the *Louisa Elizabeth*, and were captured in her: and Lord *Mansfield* C. J. only enquired whether the shipping to *Europe* was necessary to the salvage, and what was the best away of getting the money home for the benefit of the insured and insurers. And that being done, which was the best that could be done, the underwriters were held liable. There the goods were protected even after a second change of the ship. It cannot be contended that this policy covered both the cargoes at once; for then a double risk would be sustained for a single premium: and since the policy would still protect the former adventure, unless absolutely discontinued and lost, it could not, by necessary consequence, attach upon the latter cargo. But it is not required to shew that the policy continued upon the original goods, for even if it determined as to them when they were unloaded from the *Brunswick*, yet it did not attach on the new cargo. The voyage insured had a commencement, the goods came a part of the way, and the policy attached upon them; it is therefore sufficient to say, that the voyage being afterwards abandoned, the insurance was at an end. It was essential here that the goods should be shipped in *China*. In the case of *Robertson* v. *French*, 4 *East*, 130., upon a policy at and from all, any, or every port and place where and whatsoever on the coast of *Brazil*, to commence upon the goods from the loading thereof, at all, any, or every port and place, where and whatsoever, on the coast of *Brazil*, the Court held that it did not extend to goods shipped here, and sent out thither, but that the goods, to be protected by the policy, must be shipped at *Brazil*. *Hodgson* v. *Richardson*,

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Richardson, 1 *Bl. Rep.* 463. is another case directly decisive of that point. If the policy attached on the cotton sent from *Bombay* to *China*, so would it also attach on a second cargo of tea to be taken in there in exchange for the cotton, and thus the risk of these underwriters might be prolonged to every successive cargo that should be taken in, so long as the timbers of the *Brunswick* could be kept together.

For the Plaintiff it was contended, that this cargo was within the scope of the policy. The underwriters are bound to know the usual conditions of the charter-parties made with the *East India* Company: according to the custom of their trade, intermediate voyages of this nature are to be expected, and the assured cannot foresee on what service, or in what voyage the ship will be employed; a change in her destination may render it expedient for him to shift his cargo, and take other goods on board. It is therefore his object to comprehend in his policy all cargoes that may be put on board at any time during the voyage. And he could not easily express his intention more perfectly than the Plaintiff has done here. To insure for any more limited purpose would be nearly useless; for if the insurance should cease as often as the company, by changing the voyage should render a change of cargo expedient, so often would the owner find it necessary to effect another insurance on his new cargo, and he never could be secure of its continuance. The Defendant undoubtedly meant by the terms of this policy, that the risk to which he bound himself should shift from the goods originally shipped, to any others that might afterwards be put on board, so as to insure the Plaintiff's property in all events that could possibly happen on the voyage, from the time of loading the first goods on board in *China*, until he should cease to have any goods on board the ship which was sailing under the company's orders. Neither of the parties could intend that

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that if this change happened, which was a probable event, the first goods should be carried round the whole protracted voyage. Most kinds of goods are deteriorated by remaining long on board a ship. If the ship's destination is altered, the most advantageous method for the owner to pursue is to ship the original goods by some other ship directly for *England*. But unless necessity compels him to change the ship, the insurance ceases as to those goods; and he must effect a new policy on their homeward voyage. It is therefore reasonable that the original policy should attach on the goods which are substituted. The cases which have been cited are by no means applicable here; in all of them the voyage was under the control of the party insured; the distinction between policies on the *East India* trade and all others, is, that in the former the voyage is not under the control of the party insured. *Grant* v. *Delacour* was determined upon the nature of the voyage, not on the expressions used in the policy; and this case must be decided upon the same principle. The only difference, even in form, between the two policies, is, that the former was upon a voyage out and home, and contained the words "forwards and backwards;" but they were not material to that decision. They are contained only in policies on voyages out and home, and merely mean once outwards and once homewards; that is, that the assured is to have the like liberty of deviation in returning from *India* as he had in going thither. They do not relate to any intermediate voyage, as Lord *Mansfield* C. J. held in the case of *Gregory* v. *Christie*, 1 *Park*, 6 edit. 66. That was an insurance "from *London* to *Madras* and *China*, with "liberty to touch, stay, and trade at any ports or places "whatsoever." The ship was sent upon two intermediate voyages from *Madras* to *Bengal* for rice, and on the second voyage was lost. The liberty to touch, stay, and trade could not extend to places out of the course of her

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her voyage, and Lord *Mansfield* did not decide it upon those words, but upon the course and usage of the *East India* trade, which the underwriters are bound to notice. In that policy the words "forwards and backwards," were not contained. *China* and *London* and *Blackwall* are mentioned in the respective policies only to denote, by the time of the ship's first loading, and ultimate discharge, (not of her cargo, but from the company's service,) the inception and determination of the risk; they are not mentioned to define the goods upon which the risk shall attach. If the policy had been effected in the same terms upon the ship, instead of goods, this position could not be doubted for a moment. The Defendant's argument that the goods must be put on board at *China*, extends so far as to say, that if the Plaintiff had put on board in *China* a private adventure intended for *Bombay*, not for *London*, the risk would not have attached, because they would not be goods from *China* to *London*; though it is admitted that if the *China* goods had been retained on board, the ship might be dispatched on any length of service without vacating the policy. No stress is to be laid upon the expression "*said* goods," as indentifying the subject of the risk. It means such goods as shall be on board at the time of the loss. That word was used in *Grant* v. *Delacour*, and occurs in almost every policy; yet in *Grant* v. *Delacour*, and in every case, where liberty is given to touch, stay, and trade, or the voyage insured is out and home, the parties must certainly contemplate a change of the goods; for there never was a speculation to send out goods, in order to bring them home again. In the case of the ship *Duras* the goods were sent home by another ship, because it was the best possible thing for the benefit of the owners, the vessel being lost; but here it does not appear why the first goods were sent home by the *Bridgewater*, or why they might not have proceeded on board the *Brunswick*. It is not necessary to impugn that

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that case, for it does not govern this; since there the voyage was not changed, as it is here; and it is not immaterial, that this insurance is upon goods in the *Brunswick*; and on board that ship must the subject of it be found throughout the risk, unless absolute necessity intervene to excuse the shifting of the cargo to another vessel: here therefore the policy continues on the altered voyage, and attaches on whatever goods may be put on board the *Brunswick*. It is not true that the voyage may last as long as the ship endures, for the underwriters may know by the charter-party, of which they are presumed to be conusant, the beginning and termination of the ship's service. In *Robertson* v. *French* it was only decided that the policy does not attach on goods laden before the ship's arrival at the port of inception, but no case proves that the policy will not embrace goods laden at a subsequent period of the voyage.

Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court.

After stating the declaration and the facts of the case, he proceeded:—No reason was given, or at least none appeared upon the evidence, why the *Brunswick* did not proceed directly to *London*, and why the Plaintiff did not reship his own goods for *London* on board of her. The fact only was proved, that the *East India* company sent the *Brunswick* to *Canton*; not for their own benefit, but the Plaintiff applied to them that he might go to *Canton* with an adventure of his own, and permission was granted him upon the terms that the company should take in goods for themselves at *Canton*, but that they should pay no part of the freight on the outward voyage from *Bombay* thither. On this voyage the *Brunswick* was taken. The Plaintiff first sued *Delacour* upon a policy effected on the whole voyage out and home; and in that cause

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an argument was used with considerable effect, that the company, who had been very indulgent to the Plaintiff in permitting him to undertake this voyage, would probably have been less so, if they had considered the consequence; for they would thereby raise the price of insurance against themselves, since the underwriters would not hereafter insure at the usual premium, a voyage, which might, by the favour of the company to the captain, be prolonged beyond the full end of the twelve months next after the time sufficient for the voyage which was first contemplated. But it was impossible not to say that the Plaintiff must recover upon that policy. The words of it were most extensive. It was on goods, laden in *London*, and to continue on the *same* goods, which, literally taken, would be absurd, because goods are taken out for the purposes of trading and barter, not to be brought home again in specie. The policy was at and from *London*, to all parts and places on this side, and on the other side of the *Cape of Good Hope*, forwards and backwards at sea, at all times, on all services, and in all ports and places, until the ship's safe arrival back again at her last station of discharge at *Blackwall* or *Deptford*, upon any kind of goods in the *Brunswick*, beginning the adventure upon the *said* goods from the loading thereof on board the said ship at *London*, and so should continue. The Court held that these words, though literally applying only to the goods laden in *London*, must be intended to apply to any goods brought back to *London*, though they were not the same goods. Consequently, under that policy, the captain had a right to trade with his outfit, as often as he would, and the insurance attached upon any goods which he might acquire in the course of his trading, and endeavour to bring back to *England*. But in this case the words very materially differ. The policy is upon goods at and from *China* to all or any ports or places whatsoever and wheresoever in the *East Indies*, *Persia*, or

elsewhere

elsewhere beyond the *Cape of Good Hope*, in port, and at sea, in all places, at all times, and in all services, until the ship's safe arrival at *London*, not at the *last* place of discharge, an expression which was in the former case relied on for the Plaintiff, as indicating that the ship was to discharge her cargo more than once; beginning the adventure upon the *said* goods from the loading thereof on board the said ship at *China*, until the said ship, &c. and goods and merchandizes, &c. shall be arrived at *London*. Taking the words of this policy, nothing can be clearer, than that the goods insured by it are the goods to be put on board at *China*, and not elsewhere, on the voyage from *China* to *London*. But inasmuch as the company may employ the ship, while under their hire, in any service, the words "to all or any places, in "port and at sea, in all places, at all times, and in all "services," are inserted, to the intent that although the ship should be used as a ship of war, or in whatsoever employment she might be, or whithersoever the company should send her, still the policy should cover these goods. The company, it is true, send back the *Brunswick* on another voyage, but this circumstance does not alter the words of the policy, or enlarge the insurance. It might alter the effect of the policy, if there were any custom of the trade to warrant it; but not only none such is found, but it is disaffirmed by the very circumstances of this case, which shew that the turning out of these goods at *Bombay* was owing to the interposition of an extraordinary accident. It never was in the contemplation of the underwriters, or of any man, that a ship once laden with tea, a very valuable cargo, would be unloaded, and employed in war, or some other trade. If then there is no custom of the trade, there is nothing to alter the plain, fair, grammatical sense of the words. In the other policy the words "backwards and forwards at sea," had considerable force. The Plaintiff's counsel in this case contended

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contended that according to a *dictum* of Lord *Mansfield*, those words meant only from *Europe* to *Asia*, and from *Asia* to *Europe*. But this is a most unnatural interpretation: the words "backwards and forwards at sea," must mean from port to port. It was said by Lord *Mansfield* in the case of *Gregory* v. *Christie*, that since the practice had ceased of insuring both the outward and homeward-bound voyage in one policy, the words "backwards and forwards" had ceased to be inserted, but in the case of *Salvador* v. *Hopkins*, 3. *Burr*. 1707, the insurance was "at and from *Bengal*, to any ports or places where and "whatsoever in the *East Indies*, *China*, *Persia*, or else-"where beyond the *Cape of Good Hope*, *forwards and* "*backwards*, and during her stay at each place, until her "arrival at *London*." There the words must have had the meaning attributed to them in *Grant* v. *Delacour*, that is, from port to port, not from *Europe* to *Asia*. This discussion no further concerns the present question, than to shew that the case of *Grant* v. *Delacour* does not govern this. The distinction between them is, that there, by necessary construction, all the goods, which might be acquired by trading in the course of the voyage, were protected by the policy: in this case the insurance is on nothing but the goods laden in *China*, and is to continue on them until the arrival of those goods at *London*. On the true construction of this instrument therefore, we must pronounce that the voyage from *Bombay* to *Canton* was not within the meaning of the policy, nor the lost goods covered by this insurance; consequently, the rule must be

Discharged.

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BUCKLAND and Others, Assignees, *v.* NEWSAME.

Feb. 9.

A commission of bankrupt cannot be supported on the petition of one only of two partners to whom a joint debt is due.

THIS was an action for goods sold, and money had and received, brought by the assignees of a bankrupt. Upon the trial before Lord *Ellenborough* C. J. at the last *Surry Lammas* Assizes, it appeared that the commission of bankrupt purported to issue upon the petition of *Buckland* only: the petitioning creditor's debt arose upon a bond given to *Buckland* and *Dewblock* jointly. Lord *Ellenborough* inclined in favour of the objection, thinking the petitioning creditor's debt must be such an one on which the creditor could succeed in an action at law; but he permitted the cause to proceed, and a verdict was found for the Plaintiff.

Best Serjt. having on a former day in this term obtained a rule *nisi* to set aside this verdict, and enter a verdict for the Defendant,

Shepherd Serjt. now shewed cause, upon the ground that both the bond given to the Chancellor and the affidavit lodged at the bankrupt office, (for it was not the practice to lodge a formal petition for the commission,) were in the name of *Buckland* and *Dewblock*, though executed and signed by *Buckland* only, and that the commission purported to issue on the petition of *Buckland* alone, through a mistake committed in the bankrupt office, which the Chancellor would immediately rectify; so that if the Plaintiffs were put to try the cause again, they would then be able to shew a good title. *Buckland* alone, was, he contended, such a creditor, upon whose petition the commission might be supported. It was not necessary that he should be a sole creditor.

 The

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The Court held that it was a general rule, that the debt must be a legal debt, and it must therefore appear that all the partners to whom it is due, concur in the proceeding. The very words of the statute 5 *Geo.* 2. *c.* 30. *s.* 23. very properly require that the single debt of the creditor, or of two or more persons, being partners, petitioners for the commission, do amount to the sum of 100*l.* &c. If a debt were due to six partners, it would be most unreasonable if one of them might sue out a commission of bankruptcy, against the will of the other five.

Rule absolute.

Best for the Defendant.

PARSONS, Demandant. ABBOT, Tenant. KNIGHT and Others, Vouchees.

Feb. 10.

The Court will not amend a recovery by inserting the name of the husband of a vouchee who is a feme covert.

FOUR of five tenants in tail, having sold their interest to the fifth, the five suffered a recovery, in which one of them, *Ann Knight*, a feme covert, was vouched without her husband *Samuel Knight*, although he was a party to the deed to make a tenant to the *precipe*. The tenant appeared at bar in the last *Michaelmas* term: the officer then, and the Court afterwards, upon a motion at bar, thought that the recovery could not be permitted to pass, unless *Samuel Knight* were included in it.

Shepherd Serjt. now moved that the husband might be included in the recovery, and vouched, and that his acknowledgment might be taken. The parties could not in this case suffer a new recovery, because one of them was since dead.

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The Court enquired of *Shepherd* whether he could cite any precedent in support of this application, and finding he could not, directed him to ascertain what the practice had been in similar cases. They observed, that if no precedent could be found, the recovery might pass as to the other vouchees, excluding *Ann Knight* and her husband, and a new recovery might be suffered of the estate of them only. No precedent being found, it was ordered that the recovery should pass as to all the parties, except *Ann Knight*, and that her name should be struck out of the several writs and process.

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PARSONS v. ABBOTT.

MUCKLOW *v.* MAY.

Feb. 10.

If a trader gives a general order to be denied, and is denied to a creditor, it is a beginning to keep house, though he immediately overtakes him, and says he was not afraid of him.

THIS was an action for money had and received, brought by the assignees of *Royland*, a bankrupt, to recover back a sum of money which had been paid in discharge of a bill drawn by him on the 8th of *February*. Upon the trial of this cause at the sittings after last *Michaelmas* term, before *Mansfield* C. J., a witness who was a nurse in *Royland's* family stated that on the 9th of *February* her master gave her a general order to deny him. *Eyre*, a creditor, called on that day, and enquired for *Royland*; the witness told him he was not at home, but would be there soon. The witness could not at the time of the trial positively say whether *Royland* was at that time at home or not. *Eyre* left word that he wanted to see him, and went to a public house at a small distance, where in two minutes *Royland* came to him. *Eyre* asked "why he denied himself? he need not be afraid of "him:" to which *Royland* answered, "I am not afraid "of you; but I am afraid of *Hill*." *Hill* held a bill against him. Another witness stated, that he had ac-

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companied *Eyre* to the house of *Royland* five or six days previous to the 9th, at which time the same nurse denied him. *Mansfield* C. J. thought, that to constitute an act of bankruptcy, there must be a denial with a view to delay the particular creditor who called; that in this case there was indeed an order for a general denial, but that *Royland* had clearly no intention to delay *Eyre*, and he therefore directed a nonsuit.

Shepherd Serjt. having obtained a rule *nisi* to set aside the nonsuit, and have a new trial, upon the ground that an act of bankruptcy had been sufficiently proved,

Best and *Vaughan* Serjts. now shewed cause. They contended that it was not only necessary that the Plaintiff should be denied, but that he should be denied by some one to whom he had given authority to deny him. If any weight is due to the testimony of the witness who stated that *Eyre* called and was denied before the 9th, yet there certainly was no proof of any authority given to the nurse before that time. They admitted, that if a general order to deny had been given before the 9th, and *Eyre* had been denied in consequence, it would have been a complete act of bankruptcy. But this cannot truly be said to amount to a denial, on account of the qualification which was added, that he would be at home in a few minutes. It did not even appear that *Royland* was in the house at the time of the denial; or if he was, he was denied to *Eyre* by mistake. This was at most an equivocal act, and it is explained by the circumstance of *Royland* immediately going to *Eyre*. In the case of *Colkett* v. *Freeman*, 2 *T. R.* 59. which is a very strong decision upon this subject, it is admitted that an equivocal act may be explained. In the case of *Garrett* v. *Moule*, 5 *T. R.* 575. where a trader had concealed himself with his

account

account books in his garret, and a creditor called, and asked his wife for money, but did not enquire for the trader himself, it was held no act of bankruptcy. It has never yet been determined that such a transaction as this is an act of bankruptcy.

Shepherd Serjt. in support of the rule. A general order was given to deny the bankrupt to all creditors: a particular creditor called, and was denied; and though the bankrupt would not have been denied to that creditor, if he he had recollected him, yet as he was denied to him, there was sufficient evidence of a general beginning to keep house, in order to delay his creditors, inasmuch as that particular creditor was thereby delayed. The act of bankruptcy once complete, cannot be purged in this case, any more than that mentioned by *Buller* J. in *Colkett* v. *Freeman*; there the trader did mean to be denied, but did not know that in law he was committing an act of bankruptcy. An equivocal act is, when it is ambiguous for what purpose the denial is given; as if a man were employed in dressing himself, or at his meals; that may be explained; but here it is clear that there was a general order to deny for the purpose of delaying his creditors, and a subsequent partial revocation of the general order. But the bankrupt is bound by what he has once uttered. If not, within what time may the original order be revoked? If it might be revoked within two minutes, why might it not be within seven hours? If he had followed the creditor, and overtaken him within a few yards of the house, if he had even been within hearing of the denial, and had exclaimed, "I am at home," it would have been too late. If this should not be deemed an act of bankruptcy, it will give traders an opportunity to play with acts of bankruptcy, for they will give orders to be generally denied, and will call back such of the

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creditors that come, of whom they are not afraid, still availing themselves against others of the protection which they derive from the general denial.

MANSFIELD C. J. It is difficult to draw the line between two minutes and two hours. But here it was never left to the jury to say whether the denial was on the 9th, or on the preceding *Thursday* on which the other witness who accompanied *Eyre* stated the occurrence to have taken place. The Court is therefore of opinion that there ought to be a new trial in order to identify the day, and that no other evidence should be given but such as relates to that point.

Rule absolute. (*a*)

(*a*) This case was again tried at the sittings in *Trinity* term last before *Mansfield* C. J., when it appeared that the general order preceded the denial, and that both witnesses clearly alluded to the same transaction; and the jury believing the witness who fixed it either to the 4th or the 5th of *February*, found a verdict for the Plaintiffs.

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Best Serjt. in the same term moved for a new trial, upon the ground that this was no act of bankruptcy, for the reasons above assigned.

MANSFIELD C. J. On a former occasion the Court was of opinion that this was an act of bankruptcy. The bankrupt in effect admitted that he was at home at the time, for when *Eyre* taxed him with it, he did not deny it; he only said, " I was afraid of *Hill*." This was a general order to deny to all creditors, without any exception of *Eyre*. If he had said, " deny me to others, " but

"but do not deny me to *Eyre*," it might have been different. Suppose he had not gone over to the public house to *Eyre*, would not there have been a clear act of bankruptcy? And if so, how could his going thither purge it?

HEATH J. He was challenged with being at home and does not deny it, but accounts for it, by assigning the reason.

LAWRENCE J. When a person gives a general order, you must collect what was his intention at the time of giving that order. It is not enough to say, that if he afterwards recollects that he may trust a particular person, he has therefore committed no act of bankruptcy. That does not alter the original order. If there had been any limitation of the order given to the woman, it might be different.

CHAMBRE J. It makes no difference, in my opinion, that after the bankrupt was denied, he came to *Eyre* and said, "if I had recollected you, I should have excepted you out of the general order." It is equally a beginning to keep house.

The Court refused to grant the Rule.

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Feb. 11.

BRETT, Demandant. SMITH, Tenant. HONEYWOOD Bart. Vouchee.

Recovery amended by inserting a rent-charge which had long been treated as merged in the land by unity of possession.

CLAYTON Serjt. had upon a former day moved that this recovery might be amended by inserting the words, "and the annual rent of two hundred pounds issuing out of the scite of the late monastery of *West Malling*, and out of the manor of *West Malling*, *Ewell*, *East Malling*, and other lands," upon payment of the additional fine, if any, at the alienation office, and all other usual and customary fines. The circumstances were, that this rent-charge had been purchased 150 years since by *Isaac Honeywood*, out of whose lands it issued, and appeared to have been conveyed to a trustee for him: but it had been treated in subsequent conveyances and dispositions of the property, as being merged by unity of possession. The vouchee had recently suffered a recovery of the lands out of which it issued, without making any mention of this rent. And the conveyancer who examined the title, had objected that this rent did not pass by the recovery. The deed to make a tenant to the precipe was sufficiently comprehensive to include this, as it conveyed "all the manors, tenements, hereditaments, and real estate whatsoever, of which the vouchee was seised in tail, or for any other estate," and it was sworn that if this rent was not merged, he was seised of an estate tail in it.

The Court took time to consider, and upon this day,

Permitted the amendment.

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GREAVES v. STOKES.

Feb. 11.

If a Plaintiff sues a Defendant who is out of the country, for a debt contracted here by his wife in his absence, and proceeds by *distringas*, the Court will order the issue to be restored, and set aside that writ.

SHEPHERD Serjt. had obtained, on behalf of the Defendant, a rule *nisi* to set aside the writ of trespass *quare clasum fregit*, and the subsequent proceedings thereupon, and to restore the issues which had been levied under a *distringas* issued while the Defendant was abroad, and out of the jurisdiction of the Court, and that the Plaintiff might pay the costs of the application. He had moved this upon an affidavit of the Defendant's wife, that the Defendant, who was the captain's steward on board an *East Indiaman*, had sailed for the *East Indies* nine months before, and was expected to return in a few months, and that the Plaintiff knew him to be absent from the kingdom, when he gave the deponent credit for the goods which were the subject of the action, and when he caused the process to be issued.

Best Serjt. now shewed cause. The circumstance of the Defendant's being out of the realm is no ground to set aside the writ, which is the commencement of the action; nor ought it to affect the *distringas*, sued out in order to compel an appearance, which the same persons who now apply might with equal ease have entered for the Defendant. The summons was served at the Defendant's dwelling-house, and in the case of *Staines* v. *Johannot*, 1 *Bos. & Pull.* 200. the Court held that was sufficient service in the Defendant's absence, to warrant the *distringas* and levy. In 3 *Bos. & Pull.* 254. *Morley* v. *Strombom*, the Court sanctioned a distress made upon partnership property to compel the appearance of two of the partners who were abroad. Where personal service is not necessary, as in this mode of proceeding, it is not irregular

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irregular to proceed in the Defendant's absence from the kingdom: this is less oppressive than the proceeding to outlawry under the same circumstances, which it is in every day's practice to do. [*Lawrence* J. If I am not mistaken, I have seen precedents of actions against persons for outlawing those whom they knew to be out of the country. It is a practice contrary to all priciples of justice. The outlawry too may be reversed at any time when the Defendant comes in.]

Shepherd Serjt. *contrà*. The process by *distringas* may not be improper where it is not known at the time of the commencement of the suit, that the Defendant is out of the country: but here, not only is that clearly sworn to, but it also appears that the debt was contracted in his absence, and without his knowledge; and before he returns this process by *distringas* may consume all his property. The case first cited is distinguishable, because the Defendant had given a bail-bond; but perhaps that case might be fitly reconsidered. In the other case, the partner, residing at home was the representative of the whole house.

MANSFIELD C. J. The credit having been given to the wife after the husband's departure renders this a case of peculiar hardship, but it must not be understood that the Court lays down a general rule, that a man leaving at his departure debts in this country, and effects also, the creditor may not in some cases distrain; but that is not the case here. And although the wife might perhaps appear for her husband in this case, the action might in another case be brought to recover a debt which she was unacquainted with. This process is ruinous to these poor persons. The *distringas* therefore must be set aside, and the goods restored. It does not appear how the

the *quare clausum fregit* can be prejudicial to the Defendant; therefore that may stand. And as this practice has prevailed, the Court will not grant costs.

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Rule absolute to set aside the writ of *distringas*, and to return the issues which had been levied.

GURNEY *v.* HARDENBERG.

Feb. 11.

A Plaintiff who did not know at the time of giving credit, that the Defendant was out of the realm, may proceed, notwithstanding his absence, to compel an appearance by *distringas*.

So, if the Defendant, residing abroad, carries on trade in *England.*

VAUGHAN Serjt. had obtained in this instance a rule similar to that stated in the preceding case, The Defendant was, at the time of the process, detained a prisoner in *Paris*; he had during his confinement carried on trade in *London* by the agency of his wife, to whom he had sent a general power of attorney; and the debt was contracted by her; but she died about seven months before this application, which was made by the Defendant's sister, who had lived with the wife; she had no power of attorney.

Best Serjt. shewed cause. It does not appear that the Plaintiff knew at the time of the levy, that the Defendant was abroad. The person who conducts his trade and obtains credit for him in *England* may enter an appearance for him.

Vaughan in support of the rule. The Plaintiff does not deny his belief, but only his knowledge of the Defendant's absence. This certainly amounts to the general question, which was discussed in the cases of *Staines* v. *Johannot*, and *Webster* v. *Macnamara*, *Trin.* 32 *Geo.* 3. *Imp. Pract. C. B.* 4 *Ed.* 619. The process by distress is founded upon the supposition that the Defendant is guilty

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guilty of a contempt of the summons of this court. But how can it be properly said that a person is in contempt, when the summons never reaches him. It cannot be permitted that service of a summons at a Defendant's last place of abode shall enable a Plaintiff to take from him all that he has in the world: this is a dangerous power, for no affidavit of debt is necessary, and a profligate man may abuse the process of the court to any extent.

MANSFIELD C. J. What is the creditor to do if he cannot use this process? The Defendant carries on trade in this country, although he is absent, and the persons who supply the materials for his trade, and by means of which he makes his profit, cannot without this method obtain payment for a single article. It is the Defendant's own laches that he has not an attorney empowered to act for him in this country: upon the decease of the former, he ought instantly to have appointed another. Many traders who do not reside in *England* have houses of trade here, conducted by agents, who cannot be sued; there is therefore no other method than this of compelling them to pay their debts. The present is as fair a case as can be imagined for using the process, if this abominable practice be allowed to subsist; and we must either say there can be no process against any man who is out of the realm, or sanction it, in the present instance.

HEATH J. If the Defendant carries on trade in *England*, it is the same thing as if he were resident here.

CHAMBRE J. It is strange that such a practice should have so long prevailed in this court, since however it is established, it must prevail now, but it it appears to me repugnant to the principles of law and the principles of justice. The same thing is law and justice in this court,

which

which is in others: there, if the Defendant is abroad, the Plaintiff must proceed to outlawry against him, and when he comes home, he may reverse the outlawry and have his goods restored.

The Court ordered that the sum of 51*l.* which had been levied should be impounded till the next term, in order that no further *distringas* might be necessary, and

Discharged the Rule.

The KING *v.* The late Sheriff of LONDON. In Case of JONES *v.* BROADKNIGHT.

Feb. 13.

The Plaintiff at the desire of the sheriff's officer, forbore to enforce an attachment in the first instance, and ten days afterwards applied to the sheriff for the debt and costs; held that the sheriff was not discharged by the indulgence given to the officer.

ALLINGHAM, a sheriff's officer, arrested the Defendant, who paid him money to discharge the debt and costs. No bail-bond was taken. On the 19th of *November*, the Plaintiff obtained a rule for an attachment, which he sued out, returnable on the 24th, but did not then serve it. On that day the officer acknowledged to the Plaintiff's attorney, that he had received the debt and costs, and repeatedly promised payment, upon which the Plaintiff's attorney forbore to lodge the attachment in the sheriff's office. On the the 3d of *December* he applied to the secondaries to pay the debt and costs, who informed him that application would be made to *Allingham*'s sureties, and upon his making a second application on the 24th of *January*, the secondaries informed him, that they could not recover against the sureties of *Allingham* until the Court had decided that the sheriff was liable to the Plaintiff, and they then, for the first time, said that the Plaintiff had done wrong in giving credit to *Allingham*, as he had been suspended from his employment ever since the 19th of *November*. Upon this the Plaintiff caused an attachment to issue; and

Shepherd

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Shephard Serjt. having on a former day obtained a rule *nisi* to set it aside, upon the ground that the Plaintiff, by giving time to the officer, had discharged the sheriff from his liability.

Best Serjt. now shewed cause. There is no pretence for this application: the Plaintiff might in the last term have commenced an action for an escape against the sheriff, on account of his neglect to take a bail bond; and under those circumstances the Court has always refused to relieve the sheriff. *Rex* v. *Sheriff of Surrey*, 7 *T. Rep.* 239. He was apprised from the beginning by the rules that were served on him that the Plaintiff meant to resort to him: and in no case has the sheriff been relieved after notice of the transactions which pass between the Plaintiff and the officer. The omission, of which he complains, to enforce the attachment at the earliest moment, was a favour to him: or if there be any laches in this case, it is for a very few days only; and if the sheriff should prevail in this application, it will not hereafter be safe to give him a single hour's indulgence. There is no case where a less interval than three or four months has been held sufficient to discharge the sheriff. In *Rex* v. *Perring*, 3 *Bos.* & *Pull.* 151., the interval was from the 19th of *November* to the 9th of *March*, and even there the Court would not relieve the sheriff, but upon his assigning the officer's bond to the Plaintiff, that he might proceed against the sureties.

Shepherd Serjt. in support of the rule. The attachment, which the Plaintiff at the desire of the officer forbore to enforce, is no notice to the sheriff, and this case therefore comes within the principle of that which has been cited, although the interval was not so long. From the 19th of *November* to the 3d of *December* the Plaintiff gave credit to *Allingham*: and having accommodated

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dated the sheriff's officer with time, he cannot afterwards resort to the sheriff.

MANSFIELD C. J. Since I have sat in this court, the sheriff, in one or two instances, has been held to be discharged. But these have been cases where the Plaintiff, by neglecting to proceed against the sheriff, has given him reason to suppose that the matter was adjusted and settled, and where the time has been much longer than from *November* to *March*. But here the officer having taken no bail-bond, receives the debt and costs, which he had no right to do; the Plaintiff's attorney applies to the office, and all that passed there was for the benefit of the sheriff. He talks at that time of getting the money from *Allingham's* sureties, not even pretending that he was discharged.

LAWRENCE J. The sheriff ought to lay a foundation for this rule, by satisfying the court upon affidavits that he was prejudiced by the delay: nothing of that sort appears. Here too the interval is only a few days.

Rule discharged.

DAY *v.* EDWARDS.

Feb. 13.

Upon setting aside a writ of inquiry, the Court permitted the Defendant to pay money to the Plaintiff under a rule of Court, with costs of the action up to that time, and ordered that the Plaintiff's further proceeding should be at the peril of the subsequent costs.

THIS action was brought to recover the amount of repairs, goods, and money, alleged to have been done and furnished at *Cowes* by the Plaintiff, who was a ship-builder and agent, upon and for the use of a ship belonging to the Defendant, by the order of the captain. The Defendant, who resided in *Monmouthshire*, and had not seen the repairs, knowing that something must be due,

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due, suffered judgment by default. Upon the execution of a writ of inquiry before the sheriff, the jury found damages to the amount of 1600*l.* The Defendant in the last term obtained a rule *nisi* to have a new writ of inquiry executed before a judge of assize, upon the ground that many of the articles which constitued the sum of 1600*l.* were such for which it did not lie within the scope of the master's authority to contract on behalf of his owner; that the Defendant therefore was not legally answerable; and that rule was, upon discussion, made absolute, with the addition that the Defendant should instantly pay into the hands of the Plaintiff's agent the sum of 300*l.* being the amount to which he admitted himself liable. *Marshall* Serjt. on a former day in this term had obtained a rule *nisi* that this sum of 300*l.* might be struck out of the declaration, and that in case the Plaintiff would not accept thereof, with the costs, in discharge of the action, but should proceed for further damages, he should be liable to costs, unless he should recover damages beyond the 300*l.*, and also that the sheriff might summon a good jury.

Shepherd Serjt. now shewed cause. This is a motion *primæ impressionis.* The Defendant not having chosen to plead and pay money into court in the proper season, ought not to be permitted in the present stage of the proceedings, after a judgment by default, and writ of inquiry executed and set aside, and a rule obtained for executing a fresh writ of inquiry, to add these new terms to that rule, which has been already disposed of; or at least if the Defendant wished to try the merits, he should at an earlier period have moved that the interlocutory judgment might be set aside, and that he might be permitted to plead to the action and proceed to trial.

Lens

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DAY v. EDWARDS.

Lens and *Marshall* Serjts. *contrà*. The rule has merely the same effect as if the Defendant were permitted at this moment to pay money into court in the action.

MANSFIELD C. J. The motion goes too far, because it extends to costs already due, which the Plaintiff is clearly entitled to retain. But since he is in possession of the 300*l*., and his costs to the present moment, it is reasonable that the costs hereafter to accrue should abide the event of the Plaintiff's future success. With this alteration,

The rule was made absolute.

DENT v. HALLIFAX.

Feb. 13.

If a Defendant in custody employ an attorney merely for the purpose of putting in bail, delivery of declaration to that attorney is not sufficient.

ONSLOW Serjt, had on a former day obtained a rule *nisi* to discharge the Defendant out of custody as to the Plaintiff's suit in this action, and to set aside the interlocutory and final judgment, and the proceedings had thereon, for irregularity, with costs. This rule was obtained on affidavits, which stated that the Defendant being in the custody of the sheriff of *Devon* at the Plaintiff's suit, in order to obtain his liberty, procured a friend to offer on his behalf terms of accommodation to the Plaintiff's attorney; who replied, that he being only agent in the business, could give no decisive answer, but when he next wrote to his client he would mention the offer. The Defendant's friend not receiving any subsequent answer to this proposal, caused *Pasmore*, an attorney, to put in bail above for the Defendant, and to give notice of justification; but *Pasmore* was no otherwise retained or concerned in the cause. The Plaintiff's attorney, conceiving from this circumstance that *Pasmore* was the attorney in the cause,

 delivered

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delivered to him a declaration, which he immediately returned, with a letter, pointing out that this proceeding was irregular, and that the declaration ought to have been delivered to the prisoner. In consequence of the Plaintiff's having omitted to deliver a declaration before the end of *Trinity* term, the Defendant became supersedeable, and caused application to be made to a Judge at chambers for his discharge. The Plaintiff delivered a declaration to the Defendant in custody, and after that application proceeded to final judgment, and charged the Defendant in execution, who was then detained in the custody of the sheriff of *Devon* at the suit of some other Plaintiff.

Lens Serjt. shewed cause. He contended that as *Pasmore* had given notice of putting in bail, the delivery of the declaration to him was sufficient: but

The Court held otherwise, and made the

Rule absolute.

Onslow in support of the rule.

1809.

ROBERTS v. KARR.

Feb. 11.

Abuttal in its strict sense includes the idea of contiguity. Abuttals are not in general to be construed strictly.

But if the description of abuttals be such, that, if correct, it might increase the value of the premises, and induce the purchaser to take the land on that account, the deed is not merely evidence that the land abuts according to the description, which may be answered by contrary evidence,

But it shall amount to a grant that the land abuts as it is described.

A. granted to *B.* land of unequal width, described as abutting on a road on his own soil. It abutted in the broadest part on the road, but in the narrowest part a narrow strip of the grantor's land intervened between the road and the premises granted. Held that the grantor and those claiming from him were concluded from preventing the grantee to come out into the road over this slip of land.

The Court will not grant a new trial on account of a verdict being against evidence, where the damages to be recovered would not exceed five pounds.

THIS was an action of trespass for breaking and entering the Plaintiff's close, and destroying his fence, and two plants of ivy, there growing. There was also a count for an injury done to a wall of the Plaintiff's in a different place, by inserting rafters into it. The Defendant pleaded to the first cause of action several pleas, in none of which did he claim any interest in the place where the trespass was committed, and the only two pleas necessary to be mentioned, were, the fourth, stating a way of necessity, from a highway called *East Lane*, over the place in question to the Defendant's dwelling-house; and the 5th, stating that a footway passed over the place in question. The cause was twice tried: first before *Heath* J. at the *Surry Lammas* assizes 1807, when the issues upon both these pleas were found for the Plaintiff, and all the other issues for the Defendant; and again before Lord *Ellenborough* C. J. at the *Surry Lammas* assizes 1808, when the first of these issues was found for the Plaintiff, but the second, and the issue on the last count, for the Defendant. The facts which appeared in evidence, were, that *Pratt*, being the owner of a field, converted it to building ground, and laid out a street called *East Lane*, running from east to west, and another called *Camden-street*, passing out of the former, and running from south to north: at the angle formed by the intersection of the north side of *East Lane* with the

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western side of *Camden-street*, he built a house the front of which faced southwards into *East Lane* and subtended forty-one feet six inches of the length of that lane: to this house was laid, at the back of it, a piece of ground for a garden, the entry to which was through the house, and which extended northwards in a direction parallel to *Camden-street*, and was bounded on the eastern side by a brick wall, not placed in the continued line of the eastern wall of the house, but in a line parallel to it, and situated four feet six inches further to the westward, so that the house projected four feet six inches more to the eastward than the wall of the garden: *Pratt* erected a row of posts in the continued line of the wall of the house, four feet six inches distant from the wall of the garden. A portion of the garden, at the northern end, was separated from the residue, by a wall running from east to west. In 1778 *Pratt* conveyed these premises to *Compignè*, by a lease and release, which described them as "a "parcel of ground situate on the north side of *East* "*Lane*, and *abutting east on a new road* leading from "*East Lane*; and containing in front, from east to west, "towards the said lane, forty-one feet six inches of "assize, little more or less; and in depth backwards "from north to south, one hundred and twenty-one feet "of assize; and from east to west, at the back part there-"of, thirty-six feet nine inches of assize; and the messuage "built thereon," with a reference to a plan annexed; "together with all ways." There was sufficient land contained within the walls to satisfy this admeasurement. In 1790 *Pratt* demised to *King*, upon a building lease, some land lying next beyond *Compigne's* land on the north, and then open to *Camden-street*, and described it as *abutting and adjoining* to the new road. Immediately after he had executed the lease, the parties made an agreement, in consequence of which *Pratt* inserted a covenant, by which, in consideration of three guineas, he

he covenanted that *King* should, during his term, enjoy the strip of land lying under *Compigne*'s wall, for the length of twenty feet from *King*'s house to the southward, and thereupon he particularly marked this ground in the plan annexed to the deed, which contained a declaration that all the contents of the plan were intended to pass : and the deed thus interlined was re-executed and the money paid. This deed was not produced in evidence till the second trial. Upon the land thus demised *King* erected a house, the front of which faced to *Camden-street*, and stood in a line with *Compigne*'s garden wall. Between thirty and forty other houses were erected in the same line, extending to the northward, and fronting into *Camden-street*, in front of most, or all of which the proprietors inclosed a small court of the depth of four feet six inches. *King* inclosed in front of his own house a similar court, and also the piece of ground granted him by the interlined covenant; and planted it, and kept it inclosed about eighteen years. About two years before the commencement of this action, *Compigne* demised to the Defendant that part of his land which was divided from the residue at the northern end; and the Defendant built a house on it, fronting eastwards to *Camden-street*, and opened a door into that street, through the eastern wall of his inclosure, and in order to make the entrance to his house over the strip of land which *King* had inclosed, and which intercepted his access to his house on that side, he removed the fence of it, and committed the act complained of in the first count. The premises were then in the possession of the Plaintiff, under a demise from *King*. Contradictory evidence was given as to the question, whether the strip of land lying along under the wall within the posts was in fact a foot-way or not? Some witnesses stated that it was, and that the posts erected by *Pratt* were placed

 there

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there to protect it from the carriages; and that persons had walked there. And a surveyor of the roads gave evidence that he had once caused the ground within the posts to be pared, as being a public foot-way; but on the second trial *Pratt*, being duly released, stated that he had originally intended to reserve that space of ground all along under the wall for the purpose of putting on it building materials, and had put up the posts to prevent nusances; and it was also proved, that in the same year in which *King* built his house, *Compigne*, having occasion to open a door through the eastern wall of his garden into *Camden-street*, asked and obtained of *Pratt* permission to have a passage over this strip of land, into the road: and a door-way was accordingly made. Some other witnesses also stated that this land never was a part of the highway.

Lord *Ellenborough* C. J. upon the second trial, was of opinion, that if *Compigne*'s land had been sold by *Pratt* expressly for the purpose of building a house thereon, there would have been a way of necessity: but it did not appear that such was the case: and he therefore thought that there was no such way; for clearly a man could not by his own act create a way of necessity: the question therefore was, whether there was a footway used by the public upon the strip of land in question. The word *abutting* did indeed, in its strict sense, imply contiguity; but it was not necessary that the contiguity should continue along the whole length of the land granted: the expression might be explained by evidence of the user of the premises; and as they abutted on the road for the length of the house, that satisfied the description. He thought that if the land had been dedicated to the public, it was equally the highway, whether the deed mentioned it to be such or not; and if it was not used as a highway, the deed would not make it such; and he instanced

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instanced the green sward which in many places intervenes between the highway, and fields which are described in deeds as abutting on the highway. He also directed the jury that the Plaintiff was entitled to a verdict upon the last count of the declaration, upon the evidence given by one witness, a surveyor, who gave his opinion that the wall was damaged to the amount of four or five pounds, by inserting rafters therein.

Shepherd and *Best*, Serjts., for the Plaintiff, in shewing cause against the first rule for a new trial, and in support of the second rule, contended, that the deed was only evidence of the state of the land in question. It was not therefore to be concluded between the parties, that this land was the new road, because the balance of evidence was weighty in proof that the land adjacent to the garden wall in the part where the premises were contracted to a narrower dimension, was not the footpath, nor had been dedicated to the public; for it was equally improbable that the courts inclosed in front of the houses for the whole length of *Camden-street* were the public footway, which they must be, if the supposed path were continued northwards in a right line, or (which must otherwise be supposed,) that the footway, which, when it first leaves *East Lane*, for for a certain distance passes on the outside of the forty-one feet six inches occupied by *Compignes* house, should then bend inwards to the left, and follow the recess of the wall within the posts for so short a length as thirty yards, and should, at the end of that space, be again brought back to the original line. But supposing that the description in the deed was more than evidence, and was of the nature of a grant, yet it was not necessary that, in order to satisfy this description, the land conveyed should abut on a

 public

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public road for the whole length of one hundred and twenty-one feet: if abuttal did necessarily imply contiguity, still it was sufficient that any part of the premises abutted: and for a part of the length, namely, so far as the side of *Compigne's* house extended, the premises did in fact abut on the road. Or, if the deed must be understood as asserting that every part of the length of the premises abuts on the road, yet abuttal did not always and necessarily imply contiguity. A close may be properly described as abutting on a highway, although the hard road runs in the middle of a wide green sward, and that too in cases where the green sward cannot by any implication be parcel of the close granted, because it does not belong to the grantor, but is parcel of the waste belonging to the lord of the manor: yet it is a good description. Here too the soil granted was, at the time of the sale, distinctly bounded by a wall, which disaffirms the implied grant of the land without the wall. On the last count at least the Plaintiff was clearly entitled to a verdict.

Vaughan Serjt., for the Defendant, in support of the first rule for a new trial, and in shewing cause against the last, contended that *Pratt* clearly must be deemed to have sold to *Compigne* all the land contiguous to *Camden street* for the length of 121 feet, except such as was dedicated to the public service. Either the land in question, therefore, was included in this grant, so that the Defendant's land extends to and abuts upon that which the Plaintiff contends to be the highway, or the place in question is the highway, because it is that on which the lease grants that the Defendant's land abuts. When *Pratt* sold, he must have contemplated that the land would be made use of for building; for the Defendant's land was separated by a wall from the southern part of *Compigne's* garden, even before the sale to *Compigne*; so that

that it was plainly intended for the site of a coach-house and stables, or other buildings, to which there could be no access for those uses, but over the land in question. *Pratt* therefore is bound by the conveyance; and having represented by his grant that this ground was dedicated to the public, he cannot, upon an after-thought, resume it.

HEATH J. In the course of the first argument observed, that abuttals have never been construed very strictly; thus if premises be described as abutting on a house to the east, it may be the north-east or south-east.

LAWRENCE J. observed, that the description might be an inducement to the party to buy the land, by causing him to suppose that it abutted on the new road for the whole length; as between the grantor and grantee, therefore, the soil in question must be taken to be dedicated to the public. If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?

MANSFIELD C. J. observed, that there was no wall to define the boundary of the land granted to *King*, yet in both deeds the description was the same, with the mere addition of the word "adjoining," as well as abutting.

Cur. adv. vult.

MANSFIELD C. J. now expressed the opinion of the Court.

In the former instance we granted a new trial, because we thought it ought to appear how these conflict-

ing

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ing rights stood upon the deeds on both sides, for upon them the rights of the parties depend. To judge by them only, there could be no doubt. But parol evidence was introduced to prove that the ground in question never was the highway. *Pratt*, however, the grantor, was himself the principal, though not quite the only witness, who stated this. And although releases were executed which rendered him competent, yet he surely came under such a bias as must render his evidence very doubtful of credit. He states that he always intended to reserve a piece of ground between the wall and the street to put scantlings and mortar on. That is an odd reason, but it is still more singular, that, he having the intention to reserve this piece of ground four feet wide between the wall and the street, should, in his lease to *Compigné*, describe the premises as forty-one feet six inches wide at the one end, and thirty-six feet nine inches wide at the other end, abutting on the road or street. When a grantor uses the particularity of describing land by feet and inches, is it not probable that he would describe it as abutting on this piece of ground if he had intended to reserve it? This is very dissimilar to the case put of a conveyance of a field described to abut on the road, made by a man who was not owner of the soil between the field and the road, as *Pratt* was here: it is true that many premises may be described as abutting on a road, although they abut on grass land lying between the fence of the close and the road; but all that space of land was the road before turnpikes came into use, and in common parlance it is still called the road: and I should much doubt, in a case where the lord of a manor should grant land by such a description, whether he could hinder the grantee from coming out of his close over that grass land to the road. I cannot help thinking, from the difference which subsists in the two leases of the word "adjoin-"ing,"

ing," which is added in the one, and the grant to *King* of this fore-court made by the interlined covenant, that *Pratt* about that time first conceived the idea of reserving this piece of land. It is true that *Compigne* asked permission to make a door-way through his wall to pass over this strip of ground to the road: but that was at a very early period in the formation of this street; and as he asked this permission, not having his lease in his hand to see what his rights were, this does not very much bear upon the case. As to the fence erected by *King*, one of the witnesses spoke of the use of it, which was to prevent persons from committing any nusance close to the Plaintiff's house. But if a fence had been erected by the Plaintiff for that purpose on the soil of another, it would have been a very illnatured thing to have cut down that bar, and say that persons should commit nusances close to his house: so that the circumstance of this fence affords very slight evidence of exclusive possession. As to the posts, they were of very little importance; for some witnesses said they were intended to keep off the carriages, and a road surveyor proved that he had pared the ground between the posts and the wall. But supposing that *Pratt*, which I do not believe, had in his mind the intent to reserve this land, he could not consistently with what appears upon the face of these deeds, prevent the Defendant from opening his door into the street; because he has described the Defendant's land in his lease as thirty-six feet nine inches in breadth, and abutting on the street. If then he afterwards pohibits the Defendant from coming there, is it not a sufficient answer to say, you have told me in your lease, "this land abuts on the road:" you cannot now be allowed to say that the land on which it abuts is not the road. We are therefore of opinion that the verdict is right. The Judge who tried the cause has intimated an opinion, though

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though not very strongly in favour of the Plaintiff, but he rested it chiefly on the other issue on which there was evidence of the Plaintiff's wall having been damaged to the amount of five pounds. But as to that issue, first, the Court will not grant a new trial for so trifling a sum as five pounds; and secondly, it is only a question of judgment. No witness proved that the house of the Plaintiff was the worse for it, or that any man would give five shillings the less for the house on that account: all the jurors had a view of the premises, and four of them were builders, and quite as good judges as that one witness, and as likely to be right.

Rule discharged.

1809.

REGULA GENERALIS.

IT IS ORDERED, That from and after the first day of next *Easter* term, in every action to be commenced by original writ of *quare clausum fregit*, there shall be written or printed under the summons to be served by the sheriff's officer on such writ, a notice in the following form; viz.

" *A.B.* [*Defendant's name*] You are served with this
" summons to the intent that you may by your
" attorney appear in his Majesty's Court of Com-
" mon Pleas at *Westminster* at the return thereof,
" being [*the day of the month and date of the*
" *year,*] in order to your defence in this action."

AND IT IS FURTHER ORDERED, That upon every *distringas* to be issued in default of the Defendant's appearance to such *quare clausum fregit*, there shall, at the time of the execution of such *distringas*, be served by the sheriff's officer on the Defendant, if he can be met with, or if not, left at the dwelling-house of the Defendant, or place where such *distringas* shall be executed, a written or printed notice, in the following form; viz.

" In the Common Pleas—Between *A. B.* Plaintiff,
" and *C. D.* Defendant [*the names of the parties*].
" Take notice, that I have this day distrained
" upon your goods and chattels for the sum of
" forty shillings, in consequence of your not
" having appeared by your attorney in his Ma-
" jesty's Court of Common Pleas at *Westminster*
" to a writ of *quare clausum fregit*, returnable
" there on the [*state the date and year*:] And
" that, in default of your so appearing to the

" present

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" present writ of *distringas* at the return thereof, " being the [*state and date of the year*] you will be " liable to be distrained upon for such further " sum as the said Court shall be pleased to order. " Dated, &c. [*signed with the officer's name.*] To " *C. D.* the above named Defendant.

J. MANSFIELD.
J. HEATH.
S. LAWRENCE.
A. CHAMBRE.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Easter Term,

In the Forty-ninth Year of the Reign of GEORGE III.

1809.

GARNONS v. SWIFT.

April 14.

If two parts of an instrument are prepared, but one only is stamped, the party having the custody of the unstamped part may give secondary evidence of the contents of the agreement, if the other party refuse on notice to produce the stamped part.

THIS was an action for money paid, brought to recover a contribution to the amount of certain debts, which had been jointly incurred by the Plaintiff and Defendant, during their partnership in trade, and which had been discharged by the Plaintiff only. The Plaintiff gave notice to the Defendant to produce in evidence at the trial an agreement made in contemplation of a dissolution of the partnership. Upon the trial of the cause before *Mansfield* C. J. at the sittings after last *Hilary* term, it appeared by the testimony of a witness, that two parts of this agreement had been drawn up and executed, that the counterpart, duly stamped, was in the possession of the Defendant, and that the original had been left in the Plaintiff's own possession, and had never been stamped. The Defendant not producing the part in his possession, the Plaintiff pretended the part left in

his

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GARNONS
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his custody had been lost, and gave in evidence the draft of the agreement, and recovered a verdict.

Best Serjt. for the Defendant now moved to set aside the verdict and to enter a nonsuit, upon two grounds, one of which was, that the Plaintiff was not entitled to read the draft, for that the best evidence was the original agreement itself, which the Plaintiff had omitted to produce.

MANSFIELD C. J. Here was proof of notice given to the Defendant to produce the written agreement. Only one part of the agreement had been stamped, and the part kept by the Plaintiff was not stamped: therefore the question was, whether the only stamped part being left in the defendant's possession, and he not producing it on notice, the Plaintiff might not give the Draft in evidence. Suppose there had been only one part might not he under those circumstances give evidence of the contents? How does it differ, though there were two parts, if only one of them was stamped?

HEATH J. There is only one agreement here.

LAWRENCE J. expressed his opinion in favor of the verdict on another ground.

The Court refused the application.

Note. It did not appear whether it was in the Plaintiff's power to make his part of the contract evidence by getting it stamped upon payment of the duty and a penalty of 10*l*., nor was that point urged.

1809.

PAYNE v. DEAKLE.

April 21.

If an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once.

THIS cause had been referred by an order of *nisi prius*, so as the arbitrator should make his award on or before the first day of *August* then next, or on or before *any other day* to which he should enlarge the time for making his award. The arbitrator on the 22d of *July* enlarged the time till the last day of *Michaelmas* term, and on the 24th day of *November* he again enlarged it till the last day of *Hilary* term. After making the second enlargement he published his award, in which he recited that the time for making his award stood duly enlarged until the last day of *Hilary* term.

Best Serjt. now moved to set aside this award, upon the ground that the arbitrator having once enlarged the time, he had no authority again to enlarge it, but his power was at an end. The power was only to enlarge to any other day, not other *days*. He admitted he could find no case on the subject where this had been so decided.

MANSFIELD C. J. The sense of the condition is, that the arbitrator shall have sufficient time to make his award, and that if he cannot make it by the day named, he is to make it any time that he pleases; and whether he names the ultimate day at once, or at a subsequent time, is immaterial.

The other Judges concurring, the

Rule was refused.

April 21.

TALBOT v. EAGLE.

A commission of captain of volunteers, signed by the lord lieutenant of a county, does not confer the degree of an esquire.
Nor is the captain's son thereby qualified to kill game.

THIS was an action brought against the Defendant to recover the penalty of 5*l.* given by the statute of 5 *Ann. c.* 14. *s.* 4. for killing game, not being duly qualified. Upon the trial of this cause before *Grose* J. at the *Suffolk* spring assizes, the Defendant, to prove his qualification, gave in evidence a commission signed by the lord lieutenant of the county of *Suffolk*, constituting the Defendant's father the captain commandant of a corps of volunteer infantry, and styling him an esquire, and also the *Gazette* announcing his appointment, and he relied on the st. 44. *G.* 3. *c.* 54. *s.* 26. which enacts that all officers in corps of volunteers, having commissions from lieutenants of counties, shall rank with the officers of his majesty's regular forces. The jury found a verdict for the Plaintiff.

Shepherd Serjt. now moved to set aside the verdict and enter a nonsuit, contending that the Defendant's father had by this appointment been created an esquire. But the Court was clearly of opinion that the statute meant only the same military rank; the lord lieutenant of a county could not confer honours; there was no pretence to call this gentleman an esquire, and they

Refused the rule.

1809.

April 22.

LEE qui tam v. CASS.

If a person discounts a bill, and pays for it the amount of the contents, deducting only legal interest, and on a subsequent day receives usurious interest under pretence of becoming guarantee for the acceptor, it is competent to declare on the sum first paid as the sum forborne.

And it may be laid as forborne to the person who receives the money and indorses the bill to him, even supposing that that person, if sued on the bill, might recover over against the guarantee.

THIS was an action of debt on the statute of usury. The eighth count of the declaration stated, that upon a certain corrupt contract made between the Defendant and *William Easton* and *Robert Easton*, the Defendant unlawfully, corruptly, and usuriously received a large sum of money, to wit, 32*l.* 16*s.* 6*d.* over and above the legal interest in that behalf, for his forbearance and giving day of payment to the said *William Easton* and *Robert Easton* from the 22d day of *August* 1807, until a certain bill of exchange for a large sum of money, to wit, 937*l.* 10*s.*, dated the 21st day of *August* 1807, payable in six months after date, and indorsed by the said *William Easton* and *Robert Easton* to the Defendant, became due and payable, of another large sum of money, to wit, 913*l.* 12*s.*, before that time, to wit, on the said 22d day of August 1807, lent by the Defendant to the said *William Easton* and *Robert Easton*.

Upon the trial of this cause before *Mansfield* C. J. at *Guildhall*, it appeared in evidence that *William Easton*, in order to procure money upon a bill for 937*l.* 10*s.*, drawn by *Eastons* on *Hymen*, *Cohens* and Co. at six months, and accepted by them, and made payable to *Easton*'s own order, applied to the Defendant to discount it, who consented, upon condition that he should be permitted to guarantee the payment of the bill by the acceptors, and should receive for his guarantee 3½ *per cent.* upon the amount of the bill. *Easton* accordingly indorsed the bill to him, and the Defendant gave for it a check on his banker for 913*l.* 12*s.*, having deducted from the whole contents of it the sum of 23*l.* 18*s.*, being the legal interest on 937*l.* 10*s.* for six months. A day or two afterwards *William Easton* called on the De-

 fendant,

1809. LEE v. CASS.

fendant, and paid him in bank notes and cash 32*l.* 16*s* 6*d.* for the premium of the guaranty. *Easton* stated in evidence that there was no doubt of the solvency of the acceptor, and that the only reason for the guaranty was, that the Defendant would not discount the bill on any other terms. The jury considering this to be a shift of the Defendant to obtain a higher rate of interest than 5 *per cent.*, found a verdict for the Plaintiff, which having been at first entered upon a count, upon which it could not be supported, by reason of a variance in stating the date of the bill, was afterwards, upon the motion of the Plaintiff, transferred to this count.

Cockell Serjt. for the Defendant, in the last term moved to set aside the verdict and to enter a nonsuit, upon the ground that the evidence failed to support the verdict in two points. 1. That it could not be said that forbearance and day of payment was given to *Easton*, since, by reason of the guaranty, the liability of *Easton* to the Defendant upon *that* bill was wholly determined. 2. That the sum forborne was incorrectly stated to be 913*l.* 12*s.*; for either the sum forborne was the sum of 937*l.* 10*s.*, which the Plaintiff was to pay when the bill became due, or it was 880*l.* 15*s.* 6*d.*, the only real loan which remained to him after he had paid the discount and guaranty.

Best and *Vaughan* Serjts. shewed cause *instanter*. The sum of money lent and forborne in this transaction, was the whole sum contained in the bill diminished by the discount only, for that was the sum actually received by *Easton*: That sum of 913*l.* 12*s.* was lent upon the security of a bill for 937*l.* 10*s.*; the difference between the two sums is the legal interest first paid for the loan of the lesser sum. In the case of a common loan advanced on any other security, the interest is paid at the

end

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[illegible] together [illegible] the loan. It [illegible] n abuse of terms to call the loan [illegible] sum [illegible] for interest is no part of [illegible] sum [illegible] deducte[illegible] before it is lent. It is not true that the sum of 937*l.* 10*s.* is forborne from the 22d of *August* to the 24th day of *February*, when the bill became due. That sum was never due till the bill had run out. At the time of the loan, the principal only was due: the sum due was, after one day, the principal augmented by a day's interest; after two days, the principal angmented by two day's interest: but the whole six months interest were not due till the six months had elapsed. It is not necessary to state in the count what the principal augmented by the interest will amount to, but what is the principal debt. And it is impossible truly to state that, otherwise than as it is here described. The fallacy of the Defendant's argument is, that it confounds the amount of the debt with the amount of the security. If one lends 3500*l.*, and takes a bond for 4000*l.*, the security is for 4000*l.*, but the debt is 3500*l.* only. Thus in the present case, the bill of 937*l.* 10s. is the security, which brings back to the lender his principal forborne, together with the interest on it, but the principal only is the sum forborne. The original debt is the principal abstracted from the interest; the security is for the interest and principal together, and if it were not sufficient to state the principal alone as the sum forborne, it would be necessary to state a different sum as forborne on every successive day, namely, as it is varied from day to day by the accession of one day's interest. The greater sum of 937*l.* 10*s.* was never lent in this case, not even colourably. The check given was for 913*l.* 12*s.* Nor, secondly, could it be averred that 880*l.* 15s. 6*d.* was the sum lent; for the money paid for the guaranty was not deducted at the time of the transaction: the proof was, that *Easton* received 913*l.* 12*s.*, and on a subsequent day

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paid the Defendant 32*l.* 16*s.* 6*d.* This evidence would have completely disproved the allegation, if it had been made. Thirdly, in contending that the forbearance was not given to *Easton*, the Defendant treats this as being a real guaranty, not as a shift to receive the usurious interest; but the jury have disaffirmed the existence of the guaranty, by finding that it was merely a fraudulent contrivance. Nor was this a sale of the bill by *Easton*; for his name is indorsed on it, which would never have been done, if he had not meant to make himself liable. The allegation, therefore, is proved, that 913*l.* 12*s.* had been lent to *Easton*, until a bill for 937*l.* 10*s.* should become due, and that the Defendant has received a greater sum than the legal interest on the 913*l.* 12*s.*

Cockell, *Shepherd*, and *Lens*, Serjts., in support of the rule. 1. The 880*l.* 15*s.* 6*d.* only, was the sum forborne; for so far from the payment of the guaranty and the deduction of the discount being separate transactions, the jury founded their verdict on the persuasion that the whole was one transaction, and upon the remark of the Lord Chief Justice, that the amount of the premium for the guaranty was adjusted at the time of the loan, although the payment was not made till the following day. At least the sum of 913*l.* 12*s.* was forborne for one day only, until the payment of the 32*l.* 16*s.* 6*d.*, but from that time forward the sum of 880*l.* 15*s.* 6*d.* was the only sum forborne to the 24th of *February*. 2. If this be not so, the middle sum could by no possibility be the sum forborne, because the jury have expressly found that the discount and guaranty were one transaction, and the only alternative is, that the sum lent was the whole amount of the bill, without deducting the discount. If a banker discounts a bill for 100*l.* which has a year to run before it becomes due, he lends on it, not 95*l.* but 100*l.*: otherwise he would be guilty of usury in receiving

5*l.*

5*l.* for the loan of 95*l.* for a year. The sum forborne, therefore, is 937*l.* 10*s.*, and that sum ought to have been declared on; for since on the 24th of *February* the Defendant would receive that sum on the bill, it appears reasonable to say that is the sum forborne; because if it is not the exact sum lent, yet the Defendant certainly forbears to receive any part of it till that day. 3. The money is not forborne to *Easton*. It is not necessary to deny that a man may commit usury by the forbearance to one person of money lent to another: but a person cannot be said to forbear and give to another day of payment, when that day can never arrive; and here the Defendant, after the guaranty, could never have compelled payment from *Easton*, from whom he had merely purchased the bill. This might have been stated as a forbearance to any other person whose name was on the back of the bill, except *Easton*; to him it was no forbearance; because he alone, of all the indorsers could never be called on to pay this bill. It is not sufficient that the jury find some usury to have been committed, it must be the usury stated in the declaration; and without abandoning the rule of pleading, which requires the count correctly to state the sum forborne, the time for which, and the person to whom, it is forborne, this verdict cannot be supported.

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Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court.

After referring to the evidence, and stating the count upon which the verdict now stood, he observed, that it had been objected, that the usury alleged had not been proved for three reasons; first, that there was no forbearance to *Easton*, inasmuch as the contract of guaranty protected him from payment at all events. But

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this objection was not well founded: for clearly there was a forbearance till the bill became due; and the guaranty would not protect *Easton* from the payment of the bill in the hands of any other holder, but would only give him a right to recover over against the Defendant. If this objection were valid, it would give a complete facility and security to usury. The second objection was, that the sum stated to be lent ought to be the sum of 937*l.* 10*s.* mentioned in the bill. It is true that the common practice of pleading is to declare on the transaction on both ways, as well on the sum contained in the bill, as also on the same sum diminished by the discount. But the various cases in which the sum actually paid has been held to be the sum lent, must all be overthrown, if this objection were to prevail. In *Scurry* v. *Freeman*, 2 *Bos. & Pull.* 381. the declaration must necessarily have been on the sum which remained after deducting the discount. The Court there was clear that the actual sum lent was 450*l.* only, not the 500*l.* originally produced, and that so often as the Defendant received 25*l.* for a year, he received usurious interest. There is consequently no ground for that objection. Another objection, was, that if the legal discount must be first deducted, the premium of 3½ *per cent.* paid for the guaranty must be deducted also, and that the forbearance was of 913*l.* 12*s.* for the first day or two days, and of that sum diminished by the premium, for the residue of the time: but it seems to us, that the count is as right as a count can be which is stating a transaction such as this actually was. For in fact there was no deduction made from that sum of 913*l.* 12*s.*, the whole of which was paid to *Easton*; and immediately after that payment the transaction of loan was as complete as if the premium of 3½ *per cent.* had not been paid till six months or nine months

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afterwards. There is, therefore, no objection to this verdict as supported by the eighth count of the declaration, and the rule *nisi* for a new trial must consequently be

Discharged.

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BROWN *v.* TIERNEY.

April 22.

If a ship be warranted free of capture or seizure in port or ports, a capture by an enemy's ship while the vessel insured is lying in an open road, outside of an harbour, is not within the warranty.

THIS was an action upon a policy of insurance, effected upon the ship *Robert*, at and from *Gottenburgh* to her port of discharge in the *Baltic*, warranted free of capture or seizure in port or ports. Upon the trial of the cause at *Guildhall*, at the sittings after last *Hilary* term, before *Mansfield* C. J. it appeared that the vessel was bound for *Pillaw*; that there is a harbour at *Pillaw*, rendered difficult of access by a shifting bar, on which the water is too shallow to admit vessels deeply laden; that without the bar, and distant four or five miles from the custom-house, is a station called *Pillaw Roads*, where ships bound for *Pillaw*, which draw much water, usually bring to, and unload some part of their cargo, to lighten them sufficiently for passing the bar. The *Robert* came to an anchor in *Pillaw Roads*, and a pilot went on board her there, who would not permit any thing to be unloaded till the ship's papers had been examined and approved at the custom-house. The supercargo having gone on shore with the papers for this purpose, the vessel, while lying in the roads, was taken by a *French* privateer. The jury found a verdict for the Plaintiff.

Shepherd Serjt. now moved for a new trial, upon the ground that the underwriter was discharged by the warranty: the ship had arrived at the place where she

was

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was to begin unloading, she had reached her port of discharge, and therefore must be considered as being in port. If a place of discharge is not to be considered as a port, many open roads, as at *Deal*, *Hastings*, and other places must be excluded from the denomination of a port. The distance from the custom-house, at which the ship lies, is immaterial, nor can it differ the case, that the papers had not yet been approved at the custom-house.

The Court held that the meaning of the warranty was, that for whatever purpose the ship went into a port, if the enemy got down to the port by land and took her, the underwriter in that event should be discharged. But in this case the ship was as much at open sea as ever she had been: nor was it proved to be ever the practice wholly to discharge a ship in *Pillaw Roads*, but only to lighten her sufficiently to enable her to enter the harbour; and they

Refused the rule.

April 22.

COCKERELL v. CHAMBERLAYNE.

The undertaking to give material evidence, made to retain the venue, does not apply to collateral issues, but must be confined to the matters stated in the declaration.

THE Defendant in this cause having moved to change the venue from *Wilts* to *London*, the Plaintiff was permitted to retain it on the usual undertaking to give material evidence in *Wilts*. The Defendant then pleaded a tender, and the Plaintiff replied a subsequent demand and refusal. Upon the trial of the cause at the last *Sarum* spring assizes before *Chambre* J. the Plaintiff proved a subsequent demand and refusal in *London*, but gave no evidence of any transaction arising

in

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in the county of *Wilts*. The jury found a verdict for the Plaintiff.

Shepherd Serjt., for the Defendant, now moved that the verdict might be set aside and a nonsuit entered, upon the ground that the Plaintiff had not performed his undertaking to give material evidence arising in *Wilts*.

MANSFIELD C. J: The undertaking clearly goes only to what is stated in the declaration. The motion to change the venue is made before plea pleaded. The Plaintiff's undertaking therefore must be confined to the matters alleged in the declaration.

LAWRENCE J. How is it possible that before the Defendant pleads, the Plaintiff should know what he means to plead? The Plaintiff directs his undertaking only to the case which he states upon his declaration. The Defendant by his plea has since dispensed with all proof of the original debt, for he admits that.

CHAMBRE J. The plea of tender came after the undertaking, and waived it by stating a mere collateral fact. The Plaintiff does not undertake to give material evidence in *Wilts* on collateral issues. The Defendant should have again moved to change the venue after plea pleaded.

Rule refused.

April 25.

BURDON v. BROWNING.

If one party to a civil suit be convicted of perjury upon the testimony of another, the witness cannot in any manner avail himself of that conviction in the same suit.

Nor in another suit for the same cause. *Semble.*

Where a contract of life annuity is avoided and the grantee is to receive back his principal and legal interest, if annuity instalments to a greater amount than the principal and interest have been paid, Whether it is reasonable that the grantee shall refund, *Quære.*

BEST Serjt. had in this case obtained a rule *nisi* for setting aside the warrant of attorney aud judgment given to secure an annuity, which had been granted by the Defendant to the Plaintiff, and the execution which had issued, and for restoring the money which had been levied. A similar rule had been obtained in a former term upon the Defendant's affidavit, and had been discharged on an affidavit of the Plaintiff. The Defendant had since that time indicted the Plaintiff for perjury committed in swearing that affidavit, and upon his trial had himself given evidence, upon which, corroborated by the testimony of others, the plaintiff was convicted. The Defendant had now obtained the present rule upon his former affidavit, and upon another which he had himself made on this occasion.

Shepherd and *Vaughan* Serjts. now shewed cause against this rule. They insisted, first, on the authority of *Greathead* v. *Bromley*, 7 *Term Rep.* 455, that since all the same facts which were now disclosed relative to the transaction of granting the annuity, had been before the Court upon the affidavits made in support of the former motion, and the merits of the case had been on that occasion fully discussed, the matter had passed *in rem judicatam,* and the Court would not again take cognizance of it. But, 2dly, there was a much more forcible objection to the rule; namely, that the Plaintiff was convicted of perjury by the evidence of the Defendant himself, as it appeared by the indorsement on the record. This rendered the Defendant incompetent to make any affidavit upon the present motion. In the case of *The King* v. *Boston*, 4 *East*, 572. in a trial for perjury, a per-

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son who was sued by the Defendant in an action then pending, was held by the Court of King's Bench to be a competent witness, upon the very ground that the conviction procured by his testimony could in no manner be rendered available to him for obtaining relief in equity against the Defendant's action at law; and the Court there recognized the case of *Bartlett* v. *Pickersgill*, cited in that of *Abrahams* v. *Bunn*. 4 *Burr*. 2255. where the same point had been determined, and observed that no instance had been cited to the contrary. The Defendant seeks in this case to get rid of the Plaintiff's affidavit, and having by the conviction disqualified him from making any other affidavit, he grounds his application on his own evidence, now uncontradicted. This case in every particular tallies with that of *Bartlett* v. *Pickersgill*; for the present proceeding is analogous to a bill in equity, and Lord Keeper *Henley* there refused to entertain a supplemental bill, in nature of a bill of review. The question is, whether the Defendant having struck the Plaintiff out of the list of legal witnesses at a time when he had himself no interest in the event, can be permitted afterwards to create that interest, and to take advantage of his own testimony.

Best Serjt. *contrà*. The distinction is, that in this case the party is a witness in his own cause by affidavits only.

After some discussion of the merits, the whole matter was referred to the prothonotary to take the account between the parties of all annuity instalments which had been paid, and to consider the price of the annuity as money lent, and to see that the principal and interest was repaid or secured to the Plaintiff.

It

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It was urged for the Plaintiff, that if it should be found that he had received more than principal and interest, he ought not to refund any thing.

MANSFIELD C. J. I was utterly astonished when I found that it had been decided at *nisi prius*, that money which had been paid by the Rev. Mr. *Bromley* as annuity, *eo nomine*, was to be converted into principal and interest, though the grantee ran the risk of the annuity every hour. How the instalments of annuity paid ever came to be considered as part of the price returned, I know not; probably if it were *res integra* it would be held differently. It is most unreasonable to say this is money paid in part of the principal and interest. As to the great point of the effect of this conviction for perjury, I would mention that in all my memory an idea never was entertained that a conviction proceeding on the testimony of a witness who was party to a civil suit, ever could be made use of by that party in the suit in which the perjury was committed. It would quite militate with the first principles of the law of evidence.

LAWRENCE J. In the *Cricklade* cases many panalties for bribery were recovered against Lord *Porchester* and others, and the court of King's Bench refused to grant new trials which were moved for on the ground that bills of indictment for perjury had been found against the several witnesses: in one case a conviction had taken place.

Premiums of life insurance cannot be charged on the vendor of a rescinded annuity.

Shepherd, on a subsequent day, claimed that the prothonotary should allow back to the Plaintiff such sums as he had paid out of the annuity instalments received, for insuring the Defendant's life; but the Court held that unless the insurance at the Defendant's expence had been

been especially agreed for, which it was not, the Plaintiff could not be entitled to it, and observed that according to the principles which govern policies in the city of *London*, a person who pays the premium for insuring, has no higher claim on this ground than he who stands his own insurer.

WILLIAMSON v. CLEMENTS.

April 25.

Any act which is a detriment to the Plaintiff is a sufficient consideration for a promise to pay money.

An averment that the Defendant was indebted on a bill of exchange, and that the Plaintiff having lost the bill, had at his request given him a bond acknowledging payment, and conditioned to indemnify him against the bill, states a good consideration for a promise by the Defendant to pay the contents of the bill.

THE Plaintiff declared that the Defendant was indebted to him in 39*l.* 15*s.* 2*d.* by virtue of a bill of exchange drawn by the Defendant, payable to his own order, and indorsed to the Plaintiff, but which bill the Plaintiff was then unable to produce, or deliver up to the Defendant; and thereupon, in consideration of the premises, and that the Plaintiff at the Defendant's request had executed to him a bond, conditioned for indemnifying the Defendant against his afterwards being compelled to pay the said sum of money, and purporting to acknowledge its having been paid by the Defendant to the Plaintiff (although the same had not been actually so paid), the Defendant undertook to pay the Plaintiff the said sum of money upon request. After verdict for the Plaintiff upon this count, *Best* Serjt. had obtained a rule *nisi* for arresting the judgment, on the ground that no consideration was stated for the Defendant's promise.

Shepherd Serjt. now shewed cause. The Plaintiff has by this bond given the Defendant a complete acquittance and discharge for his bill, for he has not only estopped himself from ever bringing any action upon the bill which was lost, so that the bill, as between them, is gone, and he could recover the sum due only upon the Defendant's promise, but also, if a third person had recovered

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covered against the Defendant on the bill, the Plaintiff on this bond would be bound to repay him. It is a detriment to the plaintiff to relinquish his remedy on the bill, and the subjecting himself to a detriment at the Defendant's request is a sufficient consideration: it is not necessary that any benefit should result to the Defendant. By the st. 9 & 10 *W. 3. c.* 17. *s.* 3. upon the loss of this bill the Defendant was bound to give the Plaintiff another of the same tenor, taking an indemnity against the former; and the Plaintiff in fact accepts this promise in lieu of another bill, though he has not so stated it in his count. In 1 *Ro. Ab.* 22. *pl.* 21. it was held that the giving up the possession of bills of exchange was a good consideration, though they were given up at the request of one who was a stranger to the bills, and could never avail himself of them; because it was a detriment to the Plaintiff to part with them. So in an anonymous case, 1 *Sid.* 31. a son promised *J. S.* in consideration that he would deliver up the bond of his deceased father, and make him, the son, a discharge of the debt, he would pay him 100*l.*; and it was objected, that it did not appear that the son was liable to this debt; but it was answered, that it should be intended that the discharge was made to the party entitled to it, and so a good consideration, but at all events it was a detriment to the Plaintiff to deliver up the bond.

Best contrà. The Plaintiff has all the advantage in this transaction, and the Defendant none. It is sufficient for the Defendant that it does not appear on this count that he was ever liable to pay this bill. By law a drawer is discharged if he has not notice of the dishonour of a bill, and no notice is here averred. It does not appear on this count but that the Plaintiff might have negociated the bill. The Defendant could in no case have been liable for more than the amount of the bill: to that

extent

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extent he is still liable; therefore he is not benefited. In the case cited the bills were delivered at the Defendant's request: the nature of this transaction proves that this contract was entered into at the instance of the Plaintiff, for it is in no respect either beneficial to the Defendant, or prejudicial to the Plaintiff, for whose convenience only it took place.

MANSFIELD C. J. The count states that before and at the time of the promises the Defendant was indebted to the Plaintiff: that fact, therefore, must have been proved at the trial; but if he had been discharged for want of notice of the bill's dishonour, or if the Plaintiff had negotiated the bill, the Defendant could not have been found then indebted to the Plaintiff. It therefore must be taken that he was bound in law to pay the bill. The count then states that in consideration that the Plaintiff, being unable to deliver up the bill, had given a bond of indemnity and discharge, the Defendant promised to pay. What then is it, more or less than this. The Defendant was indebted to the Plaintiff on a bill of exchange, which was not then negotiated; the time of payment was arrived; for the money is stated to be then due. The bill could not afterwards pass into other hands with better rights than the Plaintiff had, it must pass subject to all the equities which the Defendant had on it. The agreement is, entirely to discharge the Defendant from payment of the bill, on his engaging in a different way to pay the money therein mentioned. Is not this a sufficient consideration?

HEATH J. concurred.

LAWRENCE J. The argument goes on a supposition which the count does not warrant; that all is done at the instance of the Plaintiff: now the count states that the

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request comes from the Defendant. I will give the Defendant credit to suppose him an honest man, and that being told the bill is lost, he had said, "give me a "bond of indemnity, and I will give you another bill." This is just as natural as if the Plaintiff had found him unwilling to do this and had requested it. It is a disadvantage to the Plaintiff to execute the bond, if it is no advantage to the Defendant. There is a case in 1 *Sid.* 57. *Traver* v. ——, where a woman, after the decease of her husband, promised a creditor, that if he would prove her husband had owed him 20*l.*, she would pay it: and it was held a good consideration; because it was trouble and charge to the creditor to prove his debt.

CHAMBRE J. concurring,

The Rule was discharged.

May 1.

WALKER and Others *v.* SEABORNE.

Although a debtor compounding with his creditors, gives them the security of a third person for payment of part of the stipulated dividend, he is not discharged upon payment of that part only, if the residue continues unpaid.

THIS was an action for goods sold and delivered. The Defendant pleaded an agreement in writing, whereby his creditors stipulated that they would accept a dividend of twelve shillings and sixpence in the pound, on the amount and in full discharge of their respective debts, in the following manner, namely, the sum of five shillings in the pound within six months, (or sooner, provided a certain leashold estate of the Defendant, therein described, should be sold, and the consideration-money received;) the further sum of two shillings and sixpence in three months from the date thereof, the further sum of two shillings and sixpence in six months, and the last dividend of two shillings and sixpence

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pence in nine months from the date of the agreement; the said sum of seven shillings and sixpence in the pound to be secured by the joint notes of the Defendant and one *Wm. Seaborne;* and that the several creditors would not, nor would any of them, after payment of the said seven shillings and sixpence in the pound, sue, arrest, trouble, or attach the Defendant. The Defendant then averred that the said agreement was subscribed by his other creditors, and also by the Plaintiffs, who were creditors for five hundred and thirty pounds, including the money which was the cause of this action. He then averred that the said three several dividends of two shillings and sixpence in the pound, amounting in the whole to the said sum or dividend of seven shillings and sixpence in the pound on the amount of the said debt of five hundred and thirty pounds, were duly paid, according to the tenor and effect of the agreement, and were accordingly accepted by the Plaintiffs before the commencement of the suit, and that he did every act necessary for the assigning, settling, and disposing of the leasehold estate in the agreement mentioned, and the same was accordingly sold and disposed of, and the consideration-money received and applied for the purpose in the agreement mentioned. The Plaintiffs replied, that the first instalment or sum of five shillings in the pound on their debt had not yet been paid to or received by them, although the space or time of six months from the time of making the agreement had long since elapsed; and although the leasehold of the Defendant in the agreement mentioned had been sold and disposed of. To this the Defendant demurred.

Shepherd Serjt. in support of the demurrer, contended, that the meaning of this agreement was, that if the three last dividends, amounting to 7*s.* 6*d.*, should be paid, the creditors should be barred of their action. He admitted

 that

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that payment to a creditor of part of his debt is not alone a consideration for a promise not to sue; it is necessary that he should also obtain some other advantage; but he contended that in this case the additional security of the brother was a sufficient advantage to the creditors to make a good consideration; it was the intent of the contracting parties, that the creditors should look to the leasehold as a fund which was to be abandoned to them, and from which they were to derive the dividend of 5*s.* in the pound if they could; but whether they obtained that sum or not, they were to release the Defendant, if they obtained the brother's security for the 7*s.* 6*d.*, and received payment of that dividend. He examined the cases of *Heathcote* v. *Crookshanks*, 2 *T. R.* 24. and *Fitch* v. *Sutton*, 5 *East*, 230. In *Kearslake* v. *Morgan*, 5 *T. R.* 513. it was held that a bill of exchange indorsed over to the Plaintiff might be pleaded in bar of a simple contract debt; because, though it was not a security of a higher nature, it gave the Plaintiff the advantage of holding a third person liable to him. *Cooling* v. *Noyes*, 6 *T. R.* 263. [*Lawrence* J. observed that the Court had abstained from giving any opinion on the point in that case, which was decided expressly on the ground of fraud.]

Vaughan Serjt. *contra*, was stopped by the Court.

MANSFIELD C. J. If the words express the payment of the three last dividends to be the consideration of the promise not to sue, it is only because the parties designated the completion of the agreement, by the performance of the act which was last in order of time to be done on the part of the Defendant, contemplating, as they did, that the dividend of 5*s.*, which was to be paid sooner, if the leasehold should be sooner sold, would at all events be paid within the period of six months from the date of the agreement; whereas the last of the other three

three dividends was not to be paid till nine months after the expiration of the former period.

CHAMBRE J. The Plaintiffs have not, without the dividend of 5*s.*, the satisfaction they agree to accept.

Judgment for the Plaintiff.

CHURCHILL v. EVANS.

May 1.

If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other.

But if two persons have the concurrent possession of land for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other, whether either one is bound to guard against casual damage, which during, and by the fair enjoyment of his right, may happen to the other, *Quære. Semb. acc. per Lawrence* J. *Contr. per Mansfield* C. J. and *Chambre* J.

But clearly the one cannot distrain the cattle of the other damage feasant. *Per Cur.*

A. having the exclusive right to dig stone in a certain close, avowed distraining the cattle of *B.*, who had the exclusive right of pasture there, as damage feasant, for having broken the stones. *B.* pleaded that there was no fence to keep them off, nor did *A.* otherwise guard or protect the stones. *A.* replied that he was not bound to fence, and on demurrer the replication was held bad.

Whether licence to take a profit apprendre be assignable, *Quære.*

IN replevin, the Defendant avowed that *C. Bragge* being seised in fee of the place in which, called *Goulding's Hill Inclosure*, demised and granted to *C. Emmet* and *W. Emmet*, and their assigns, the sole and exclusive liberty, license, and authority, from time to time and at all times thereafter, of working and quarrying of all quarries of paving stone, and tiles, that might be found in and upon the same, and all the paving stones, and tile, in or under the said place in which, for the term of 27 years; by virtue of which demise and grant, the said *C.* and *W. Emmet* entered into the said place and became possessed of the said sole and exclusive liberty, &c. together with all the paving stone and tile under the same close, according to the effect of the said demise and grant: and being so possessed, afterwards assigned the same to the Defendant for the residue of the term, by

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virtue whereof the Defendant entered the said place, and was possessed of the same liberty; and because the said cattle, at the time when, were wrongfully and injuriously in and upon that part of the said place in which, which just before and at the said time when, was used by the Defendant for the purpose of working and quarring the quarries of paving stone and tile, there before that time found, and then found, breaking and injuring the paving stones and tiles then there being, and breaking and entering the sheds of the Defendant, then there necessarily erected and being, for the purpose of quarrying and working the said quarries of paving stone and tile there, and for the complete enjoyment and excrsise of the said grant and demise, and doing damage there to the Defendant, he avowed taking them as a distress for such damage. The Plaintiff, denying by protestation the sufficiency of the avowry, and the demise by *Bragge*, pleaded, that the place in which was a close containing six acres, and that he, the Plaintiff, was lawfully possessed thereof, and that there was not, at the said time when, nor for long before was there, any sufficient fence or mound to prevent or hinder cattle, depasturing in the said close, from entering into and upon the said part of the said close, which was used by the Defendant for working and quarring the said quarries of paving stone and tile found in and upon the said place in which, or breaking and entering the said sheds, or to separate the same from the residue of the said close; and that the Plaintiff being so possessed of the close, a little while before the said time when, put in his cattle to depasture the grass there; and if the said cattle, at the said time when, were in and upon that part of the said close which just before the said time when, was used by the Defendant for the purpose of quarrying, &c. breaking and injuring the paving stones and tiles there, and breaking and entering the the sheds there erected, the same was occasioned

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occasioned by the neglect and default of the Defendant, in not properly guarding, watching, fencing, and protecting the said stones, tiles, and sheds, from the said cattle, so lawfully turned into the said close, for the purpose and on the occasion aforesaid; and the cattle were in the said close, as it was lawful for them to be, on the purpose aforesaid, until the Defendant of his own wrong seized and took them, &c. The Defendant, protesting against the sufficiency of the plea, replied, that neither before nor at the said time when, was it the duty of him, the Defendant, neither was he in any way obliged, to raise up any fence or mound, to prevent or hinder any cattle depasturing in the said close, from entering into and upon the said part of the said close, which was used by him for quarrying, &c., or from breaking and entering the said sheds, or to separate the same from the residue of the close. The Plaintiff demurred, and assigned for causes, that the Defendant by his replication did not in any manner shew that he was not in default by not watching or otherwise keeping off the said cattle from the said stones or quarries; and that the replication did not deny the right of the Plaintiff to turn his cattle into the said close in which, nor his possession of the close, nor shew any obligation on the Plaintiff to fence out, or watch the said cattle, from the said parts of the said close where the same were taken; and that the replication was, in this and other respects, no answer to the plea, nor could any issue be taken on it; and that the replication shewed no ground for supporting the distress, and seemed to draw into issue before a jury, matter of law only, and no proper issue could be taken on it. The questions intended to be raised on these pleadings were, 1. Whether the interest conveyed by the grant to the *Emmets* was of such a nature that it could pass by assignment to the Defendant; and 2. Whether, in consequence of the grant of licence to work the stone quarries,

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the owner of the land was answerable for damages done by his cattle, put into other parts of the close, and straying for want of fences into that part occupied by the grantee's works. 3. Supposing the owner of the land to be answerable for such damage, whether the grantee was justified in distraining, or whether, inasmuch as there was no demise to him, or exclusive possession of the soil in him, he should not rather have brought an action. 4. Whether the replication was sufficient, in denying merely the obligation on the grantee to fence, and not his obligation to watch and protect the quarries and works.

The Court relieved *Best* Serjt. who would have argued in support of the demurrer, and called upon *Lens* Serjt. to support the replication, desiring him to consider whether, supposing this grant amounted to a demise, it would hinder the possessor of a close from depasturing it in common with the Plaintiff.

Lens admitted, that if this grant conveyed nothing more than a licence to do some act in the close of another, he could not sustain the case. But the grantor, in giving the sole and exclusive privilege of taking the stone, had granted so much, that he could not himself enter on the grantee; and though he might turn his cattle into the other part of the field, which was not quarried, he must take care to confine them to that part. Neither one of two neighbours is bound to fence against the other, except by prescription. Therefore when the Plaintiff alleges that his cattle entered on the Defendant for the want of fences, it is sufficient for the Defendant to say that he is not bound to maintain a fence: it is only required of him to shew that he has a right to distrain, which he does, by stating that he is under no obligation to fence; and that the cattle have trespassed on

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on the quarry which he is working. [*Heath* J. observed that the avowry stated a license only, so that upon the pleadings no question could arise respecting the effect of a lease.] In a demise of pasturage there is no absolute demise of the soil. In *Burt* v. *Moore*, 5 *T. R.* 329. it was held that a person who had a demise of the milk of certain cows to be fed on certain land, with a covenant that no other cattle should be fed there, might maintain trespass against the possessor of other cattle which came into those fields; and if he could maintain trespass, no doubt he could also distrain them. That was argued to be merely a license, and a personal covenant about milk, but it was held otherwise. So in *Wilson* v. *Macreth*. 3 *Burr*. 1824. which was an action for cutting turf, it was held that trespass lies wherever there is an exclusive right. In the present instance there is an exclusive right. 2 *Ro. Ab*. 549. *Trespas H*. He that hath only the herbage of a forest, or close, may have trespass *quare clausum fregit*, as well as if he had the land. So if one seised in fee demise the pasture of a close for years, the grantee shall have trespass *quare clausum fregit*, for the close itself is thereby demised to be pastured, and not merely the pasture to be taken by the mouth of his cattle. *Ibid. pl.* 2. With respect to the obligation which lay on the Defendant to fence, it is held in the case of *Webb* v. *Paternoster*, 2 *Ro. Rep*. 143 and 152., that one who had licence for a limited term to put his hay on the land of another, could not maintain trespass against the lessee of the soil, whose cattle had eaten his hay after the term was expired; but besides that objection derived from the determination of the licence, which in the present case is still in force, there is a substantial difference in the nature of the grant; for in this case the grant abridges the grantor's future power of turning his cattle over his own field. The necessity of maintaining a fence, or keeping a guard to watch the cattle, is not incumbent

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on the Plaintiff. It is similar to the case of two persons having adjoining fields, and no hedge between them, where neither is bound to repair the fence, but each must take care that his own beasts do not trespass on his neighbour. 2 *Ro. Ab.* 565.*pl.* 7. If my land be open to the highway, and the beasts of a stranger enter upon the land, it is not justifiable. Otherwise, if cattle in passage on the highway eat herbs or corn, *raptim et sparsim*, against the will of the owner: it will excuse the trespass. *Co. Dig. Trespass D. Co. Dig. Droit. M.* 2. If the owner of 200 acres in a common moor enfeoffs *B.* of 50 acres, *B.* ought to inclose at his peril. And *Dyer*, 372 *b.* is cited, where the case is, that " a man seised of 200 acres of common moor, enfeoffed another of 50 acres of this moor, towards the north. The feoffee puts his beasts into the 50 acres, and *pro defectu clausuræ*, the beasts stray into the residue of the moor, and are there distrained, damage feasant; and it seems a good distress; for the purchaser is holden by law to enclose or guard his beasts within the 50 acres, and so it seems ought the lord of the residue to do as to his beasts; and so was it adjudged in this term." In like manner, undoubtedly, the landlord or his tenant in the present case is entitled to use his pasture of the residue of his close, but he is also bound to prevent his cattle from entering on the other part; and to draw the Plaintiff's attention to this point, the Defendant shews an exclusive demise of the quarry, in consequence of which the Plaintiff cannot lawfully permit his cattle to wander over the said place in which, without taking care that they do no damage. This is not the case of a joint or common occupation, in which, undoubtedly, trespass would not lie, but it is an exclusive possession. In *Wilson* v. *Mackreth*, it was said that the circumstance of other persons having common of pasture over the turbary ground was immaterial. The replication, therefore, has sufficiently denied the material part of the plea, which infers an obligation on the Defendant

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fendant to maintain a defence. As to the validity of the assignment, he admitted, that if the grant did not amount to a lease, but conveyed merely a licence, it was not an assignable interest.

Best in reply was stopped by the Court.

MANSFIELD C. J. The cases cited do not come up to the present question. Upon the feoffment of 50 acres, each party had an equal exclusive right in his own land. Here the Defendant has the exclusive right of digging stone, but the Plaintiff has every other right in the soil, and he does not by any act of his injure the Defendant's right: but the Defendant having a partial and limited right here to take the stones, and the Plaintiff possessing all other rights, in the fair exercise of the right of pasturage, which is one of them, this damage accidentally happens.

CHAMBRE J. In the case of *Wilson* v. *Macreth*, the Plaintiff had not a mere right of turbary, but the exclusive possession of a portion of the turbary land, marked out by metes and bounds. But this quarry may progressively extend over every part of the close. There would be no end of fencing in this case; for as soon as the Plaintiff had fenced, the Defendant would dig stone under the fence and destroy it. He cannot possibly have any thing more than a concurrent possession of the land. And he cannot distrain a tenant in common.

LAWRENCE J. The argument supposes that no advantage could arise to any person upon that spot, except from the stone; but the Plaintiff has not by his pleadings disaffirmed that other advantages might arise on that spot, besides the getting those stones, as herbage for the cattle.

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cattle. Perhaps the Defendant might have brought an action for the mischief the cattle had done, or might have driven them off; but here he has distrained them.

Judgment for the Plaintiff.

May 2.

HINDLE v. SHACKLETON.

If a client in the course of a cause advances money to his attorney for specific disbursements in the cause, those disbursements must nevertheless be included in the bill of costs. Therefore, where, upon taxation, a sum was deducted less than one sixth of the amount of the bill delivered, including those disbursements, the Court ordered the client to pay the costs of the taxation.

PELL Serjt. had obtained a rule *nisi* that Mr. *Crossley* might pay to *Shaw*, the Plaintiff's attorney in this cause, the costs attending the taxation of his bill of costs, less than one sixth part having been taken off by the prothonotary. This rule being prematurely made absolute, *Best* Serjt. obtained a rule *nisi* to discharge it, suggesting that more than one sixth part had been taken off; and whether that were so, depended upon the construction which the Court should put upon the statute 2 *Geo.* 2. *c.* 23. *s.* 23. in its application to the following circumstances. *Crossley*, who was the real Plaintiff, attended at the *York* assizes at the trial of the cause, and after the briefs were delivered to his counsel, paid *Shaw*, his attorney, a sum of 65*l.* 10*s.* to be disbursed in fees to them. *Shaw* charged these fees in his bill of costs, which, including them, amounted to 276*l.*, and exclusive of them, would have amounted to 210*l.* 10*s.* only. The prothonotary struck off from the bill 33*l.* 13*s.* 10*d.*, which was less than a sixth part of the former sum, and more than a sixth part of the latter.

Pell Serjt. in shewing cause against this second rule, contended that the act of 2 *G.* 2. *c.* 23. *s.* 23. must be so understood, that the client has a right to demand from his attorney a bill of all the items that occur in the course of a cause: and if the attorney had omitted these charges,

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he would not have duly complied with the order for taxation: if the client has not a right to require this, those items, although charged, cannot be the subject of taxation; and, consequently, if those sums have been improperly included in the bill, the prothonotary must review his taxation, and tax the bill without them. But the sound construction is, to consider the whole bill together; and in that view of it, less than one sixth has been taken off; and if that is so held, the Court will consider this statute as a good guide to them in the exercise of their discretion, and they will not give the Plaintiff the costs of the taxation. *Hurst* v. *Dixon*, *Barnes*, 118. *Barker* v. *The Bishop of London*, *ibid.* 147.

Best, *contra*, urged that *Shaw* ought not to have included these fees in his bill. If this sum of 65*l.* 10*s.* had been a sum paid to the attorney generally on account, it might have been proper to charge those fees, but the client paid him this sum with a specific appropriation to a particular purpose. At least the Court, in the exercise of its discretion, will not give the attorney his costs of the taxation in such a case.

The Court observed, that in causes of magnitude it must frequently happen, that the client makes advances to the attorney in the course of the cause: yet it was never the practice to strike out those items from the bill.

The Rule was discharged.

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May 2.

WAINWRIGHT, Demandant. SEAGRAVE, Tenant. SMITH, Vouchee.

A recovery cannot be suffered of premises in one of two counties in the alternative.

COCKELL Serjt. moved to amend a recovery, by inserting therein, instead of the words "*Rufforth* in the city of *York*," the words "*Rufforth*, *alias Ruffo*, in the county of *York*, and in the county of the city of *York*, or one of them;" such being the description of the premises in the deed to lead the uses, and it being doubtful in which of the two counties a part of the premises was situated.

The Court held that it could not be permitted to put the counties in the alternative, for that a recovery was originally a possessory action, and local. If part of the premises was situate in each county, or if the parties did not know in which county they lay, the only expedient was to have two recoveries.

BAKER *v.* HALL.

May

Where time to plead has been given under a Judge's order, the Plaintiff may sign judgment without demanding a plea.

COCKELL Serjt. had obtained a rule *nisi* to set aside the interlocutory judgment which had been signed in this case for want of a plea. The Defendant had regularly appeared and twice obtained, under a judge's order, further time to plead. That time expired on the 9th of *March*, and on the 15th, the Plaintiff without having made any previous demand of a plea, signed judgment.

Shepherd Serjt., in shewing cause against the rule, relied on the authority of *Pearson* v. *Reynolds*, 4 *East*, 571.

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and *Burkett* v. *Latham*, *ibid.* where the practice was established in the King's Bench, that after an order for time to plead, the demand of a plea is no longer necessary.

Cockell contrà. A possitive rule of the Court makes the demand of a plea necessary in the case where no judge's order has been obtained: it must therefore be inferred that the same practice prevails in all other cases, though the rule does not in terms apply to them.

The Court, upon a reference to the officer, observed, that it never had been decided that a demand of a plea was necessary in such a case as this: in the Court of King's Bench it was held unnecessary, and since it was highly desirable to render the practice of the two Courts as nearly uniform as possible, it should in future be considered as a settled rule, that where there is an order for further time to plead, no demand of a plea is necessary. This too was much the more reasonable way; for since the Defendant prescribes to himself by his order the time within which he shall plead, no demand can be necessary to acquaint him with the time: the rule was accordingly about to be discharged: but

Cockell produced an affidavit of merits, and took on himself the payment of costs, upon which the Court made the rule

Absolute.

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May 2.

Webb v. Geddes.

If a declaration in debt contain any one count on a contract, on which debt would not lie at the time of passing the stat. 3 *Jac.* 1. *c.* 8. bail in error is not necessary.
Debt will not lie on a bill of exchange against the acceptor.
Therefore bail in error is not necessary upon a judgment in debt against the acceptor of a bill.
Nor upon a judgment for goods sold and delivered,
Or for money paid,
Money lent,
Money had and received,
Or on an account stated.

THE declaration in this case was in debt: the first count was upon a bill of exchange for 995*l.* 9*s.* which the Defendant had accepted, by way of paying for goods of the same amount which he had purchased of the Plaintiff: there were also counts for goods sold and delivered, money lent, money paid, money had and received, and upon an account stated. The Plaintiff having signed judgment for want of a plea, had proceeded to take out execution, notwithstanding the allowance of a writ of error, the Defendant not having put in any bail in error.

Best Serjt. on a former day obtained a rule *nisi* for setting aside the execution, and returning the money levied: in moving for this rule, he insisted that bail was not necessary in this instance under the st. 3 *Jac.* 1. *c.* 8., because the word contract in that statute has always been confined to an express contract, such an one on which debt could have been brought at the time of passing that act. In 2 *East*, 359, *Tryer* v. *Bridgeman*, Lord *Ellenborough* C. J. threw out, that if there are counts on which the Defendant is not entitled to bail in error, the adding one count, on which, if it stood alone, he would be entitled to bail, will not entitle him to it on the whole declaration; and for this there is a good reason; for in debt the judgment is for the amount of the several sums laid in all the counts, and the bail recognizance is taken in double the amount of the judgment; although by a relaxation introduced into the practice of the court, it is sufficient if the bail justify in double the sum really due. *Alexander* v. *Biss*, 7 *Term Rep.* 449. it was decided, that bail in error is not required upon an account

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stated. *Ablett* v. *Ellis*, 1 *Bos. & Pull* 249. it was held that no bail in error is required in a judgment in debt, unless it appears that the action was brought on a specific contract. It has never been determined that debt lies against the acceptor of a bill of exchange.

Lens and *Marshall* Serjts. now shewed cause against this rule. They contended that the bill of exchange was a contract within the meaning of the statute: as to the count for goods sold and delivered, though it might under some circumstances be an action for an uncertain demand, it was not so in the present case, since it appeared by the Defendant's affidavit, that the value of the goods had been ascertained between the parties, and a bill given for the liquidated amount. It was not essential that the contract should be in writing; but if it were, the bill of exchange was a sufficient contract in writing.

Best, in support of the rule, relied on the authorities before cited, and observed that in the case of *Tryer* v. *Bridgeman*, where one of the counts was on a promissory note, and the only other two counts were on a *quantum valebant*, and on an account stated, the Court of King's Bench held that there was no one count in the declaration, upon which, if it had stood singly, bail in error would have been required. For at the time of passing the statute of 3 *Jac.* 1 debt could not have been brought on a promissory note: and it was decided in *Yelv.* 227. *Girling* v. *Baker*, that though an account stated reduces unliquidated demands to a certainty, it does not follow that the debt was upon a contract at first. So, an award is not within the statute, because it may be, that there was not any contract at first, though the arbitrator reduces the several demands to a specific sum. 1 *Sho.* 14. So, *Pitt* v. *Coney*, 1 *Str.* 476. it was held that a bottomry

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bond, by the contingency having happened, became a bond for the payment of money only. In *Bidleston* v. *Whytel*, 3 *Burr*. 1548, an action on a judgment was held to be a peculiar species of action not enumerated in the statute.

MANSFIELD C. J. The cases have decided, (for what reason I cannot perceive), that the count for goods sold and delivered is not an action upon a contract, and we must abide by the decision; we can only look at the record, we cannot examine whether the evidence to support the count is the evidence of an express, or of an implied contract. Besides, if that were a count upon a contract, yet it has been determined that where there is a general judgment, and one of the counts is not upon such a contract on which debt would lie at the time of passing this statute, bail in error cannot be required upon the single count.

LAWRENCE J. What count is there in this declaration upon which, properly speaking, debt will lie? In *Hardr*. 485. Lord *Hale* C. B. determined that debt would not lie against the acceptor of a bill of exchange, and Lord *Eldon* in this court recognized the same doctrine; and it was determined in *Tryer* v. *Bridgeman*, that if there be one count for which bail in error is unnecessary, it is not necessary for any.

CHAMBRE J. I am very sorry we are bound to conform to such a rule, but the cases are all so.

Rule absolute.

1809.

HOLMES, Gent. one, &c. v. CATESBY.

May 6.

The justification of a libel must state issuable facts, not general charges of misconduct.

A libel charged an attorney with general misconduct, viz. gross negligence, falsehood, prevarication, and excessive bills of costs, in the business he had conducted for the Defendant. A plea in justification, repeating the same general charges, without specifying the particular acts of misconduct, upon demurrer was held insufficient.

THE Plaintiff, who was an attorney of this court, declared upon a libel published by the Defendant, concerning the Plaintiff in his business and profession, and of and concerning certain businesses in which he had been retained and employed by the Defendant, and of and concerning the bills of costs and charges which he had delivered to the Defendant, in the form of a letter directed to one Mr. *Thomas Monkhouse*, which was as follows: "At the time of your recommending Mr. *Holmes* to me as an attorney, I am persuaded you acted from the purest motives, and with a view of mutual advantage to both parties: from your opinion, and wish to serve Mr. *Holmes*, I was induced to employ him, and for some time was satisfied with his conduct. A case of gross negligence, falsehood, and prevarication, compelled me to withdraw from him my confidence, and to transfer it to a gentleman of honour and respectability: in consequence of this, a most enormous bill of costs has been brought against me; this, by legal advice, has been taxed, and reduced nearly one third, and paid; not yet satisfied, he now produces another bill against me, the items of which are so extraordinary, that at this moment I shudder at the bare recollection of having employed a man so truly base and contemptible. I have stated these facts for your consideration, and the several vouchers are in my possession; and I do presume the inspection of them is not unworthy your notice." The Defendant pleaded in justification, as to such part of the letter concerning the Plaintiff's character and conduct as relates to the recommendation of the Plaintiff to the Defendant by the said *Thomas Monkhouse*, and the consequent employment of the Plaintiff by the Defendant, and the conduct of the

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Plaintiff in the execution of the said employ, and the transferring of such employment from the Plaintiff to a gentleman of honour and respectability, and the subsequent delivery of enormous bills of costs by the Plaintiff to the Defendant, and the taxation thereof and reduction therefrom, and payment thereof, and the delivery of a further bill of costs, and the impression which such conduct left upon the mind of the Plaintiff, and the opinion of the necessity which then existed of informing the said *Thomas Monkhouse* in a friendly manner of the conduct of the man the said *Thomas Monkhouse* had recommended; that before the said time, &c. he, the said *Thomas Monkhouse*, had recommended the Plaintiff to the Defendant as a fit person to be employed by the Defendant as an attorney and solicitor, and that at the time he, the said *Thomas Monkhouse*, recommended the Plaintiff to him, the Defendant, as an attorney, he the Defendant is persuaded that the said *Thomas Monkhouse*, acted from the purest motives, and with a view of mutual advantage to both parties; and that from the said *Thomas Monkhouse's* opinion and wish to serve the Plaintiff, he the said Defendant was induced to employ the Plaintiff, and for some time was satisfied with his conduct, and that, before the composing and writing, &c. the said letter, a case of gross negligence, falsehood, and prevarication, compelled him the Defendant to withdraw from the Plaintiff his confidence, and to transfer it to a gentleman of honor and respectability, that is to say, to one Mr. *James Platt*: and that in consequence of this a most enormous bill of costs was, before the composing, writing, and publishing the said letter, brought against him the Defendant, which by legal advice was, before the time last aforesaid, taxed, and reduced nearly one third, and paid. And the Defendant further averred, that the Plaintiff, not then satisfied, before the time of the writing, &c. the said letter, produced another bill against him the Defendant, the items of which

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which were, at the time of writing, composing, and publishing the said letter, so extraordinary, that at the moment of writing and publishing the said letter, he, the Defendant, shuddered at the bare recollection of having employed a man so truly base and contemptible, as in his, the Defendant's, opinion, the Plaintiff must have been; and the Defendant averred that he stated the fact for the said *Thomas Monkhouse's* consideration, and that the several vouchers were in his, the Defendant's, possession, and that he did presume the inspection of them was not unworthy of his the said *Thomas Monkhouse's* notice; for which reasons he the Defendant, at the said times when, &c. did write, compose, and publish of and concerning the Plaintiff, and his conduct as such attorney and solicitor in his aforesaid employment, the said letter, as it was lawful for him to do for the reasons aforesaid. To this the Plaintiff demurred, and alleged for cause, that the Defendant had not set forth or shewn in and by his plea, specifically, particularly, and circumstantially, what case or cases, or how, or in what manner, or under what circumstances, the said case or cases of gross negligence, falsehood, and prevarication, in the plea mentioned, and which compelled him, the Defendant, to withdraw from the Plaintiff his confidence, and transfer it to the said *James Platt*, arose, or was, or were occasioned, as he ought to have done; or what facts, circumstance or circumstances, constituted or was, or were, the cause or causes of the said case or cases of gross negligence, falsehood, and prevarication: and for that the Defendant had not particularly or specifically shewn or disclosed in and by his plea any cause or causes why or wherefore he the Defendant shuddered at the bare recollection of having employed a man so truly base and contemptible, as in his the Defendant's opinion the Plaintiff must have been: and also for that the Defendant had set forth the charges against the Plaintiff in so indefinite and uncertain a manner that the Plaintiff could not know what particular facts the

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Defendant would attempt to establish by evidence under them, or either of them, on the trial of this cause, in order to support the aforesaid charges and libellous matters and things against the Plaintiff; and therefore that he the Plaintiff cannot be prepared to disprove and answer the same as he ought to be, and otherwise would have been. The Defendant joined in demurrer.

Sepherd Serjt. in support of the demurrer. This plea is bad: for it is not sufficient generally to repeat the libel: it is necessary to state in justification some facts, which, if true, would warrant the words complained of, and on which the Plaintiff, who in some sort becomes a Defendant in these Cases, may take an issue, and may come to trial, knowing what is the specific charge against his character, and prepared to answer it. This doctrine is laid down in 1 *T. R.* 748. *Johnson* v. *Stuart,* and also in the case of *Newman* v. *Bailey,* there cited; in the former of these cases it was held that a plea averring "that "the Plaintiff had been illegally, fraudulently, and dis-"honestly concerneed and connected with, and was one "of a gang of swindlers and common informers, and "had also been guilty of deceiving and defrauding divers "persons with whom he had had dealings and transac-"tions," was too general; and that the Defendant ought to allege some special circumstances, together with the time and place, so as to give the party an opportunity to meet the facts on which the allegation is founded. In the latter case, a plea "that the Plaintiff was a justice "of the peace, and had convicted divers persons re-"spectively in divers fines and sums of money, for and "on pretence of their having respectively committed "divers respective offences, which said respective fines "and sums of money, amounting in the whole to 50*l.*, "he had received of the respective delinquents so by "him convicted, and had not paid the same to the se-"veral persons to whom the same ought to have been

"paid

" paid, by virtue of the respective statutes, but had kept " and detained the same," was clearly held bad on special demurrer, because it did not specify any one fine or penalty which had been improperly detained. It is very probable that in the present case the circumstances to which the Defendant alludes would not support his assertion: if he had stated them, and they had appeared insufficient, the Plaintiff would have had the opportunity to demur: but here, to use the language of *Buller J.*, if this plea were to be suffered, it would be to allow any person to libel another more on the records of the court than he could do by the original vehicle of the slander. If the Plaintiff had not demurred to this plea, but had repied, *de injuriâ*, he must have gone to trial prepared to justify the transactions of his whole life, since the plea does not point out to him any one of them as the particular fact alluded to.

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Williams Serjt. *contrà*. This case is very distinguishable from the only two cases which have been cited. Those were cases of general charges of malpractices. In the present case, it is the Plaintiff only, who asserts that he has been guilty of negligence, falsehood, and prevarication; for the Defendant only says that a case of that nature induced him to withdraw his confidence, without saying who had been guilty of it. The Court must, therefore, conclude that the Plaintiff's attention was sufficiently drawn to particular passages in his own conduct, to which he applies the libellous words, so that he would have been under no difficulty to know what facts would be put in issue on the trial. A general charge certainly gives no notice what facts would be put in issue, but this charge relates only to one private transaction between attorney and client, occurring within a short period of time; it must therefore be familiar to the

 knowledge

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knowledge and memory of both parties; nor does the plea, as was urged, compel the Plaintiff to review the transactions of his whole life.

Mansfield C. J. It is probable that the Plaintiff may know what transaction is alluded to, but the Court cannot be sure that he does, and possibly he may not; and in that case he must come to trial prepared with all the clerks that have been employed, and all the papers, in all the causes in which he has ever been engaged for the Defendant: the imputation of gross negligence and excessive charges is clearly actionable.

Heath J. I am of the same opinion. It is said that this plea charges something specific. But I agree with *Buller* J., in *Johnson* v. *Stuart*, if there be any thing specific in the subject, though it consist of a number of acts, they must be all enumerated: the Defendant, who must be taken to know them, must disclose them.

The Court permitted the Defendant to amend on payment of costs.

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May 6.

If an award direct one of two things to be done in the alternative, and either of the two is uncertain, or impossible, it is incumbent on the party to perform the other of them.

If an award direct that money shall be paid, or be secured to be paid, the party must either pay the money, or give such security as is satisfactory to the person entitled to receive it.

If it be not a condition of the submission, that the award shall be made on all the points submitted, an award determining some of the points only, is good, provided that the omission of the others do not destroy the equipoise of considerations.

If an award order two things in favour of one party, one of which is uncertain, or for other reasons cannot be enforced, he may waive this, and sue upon the breach of the other.

If an arbitrator be appointed to arbitrate a certain measure contemplated between two parties, as a dissolution of partnership, he is not necessarily bound to direct that the partnership shall be dissolved.

THIS was an action of *assumpsit* brought upon a award. The declaration stated, that the Defendant and the Plaintiff were copartners in trade; and that certain disputes and differences having arisen between them, they had submitted themselves to the award of the arbitrator, indifferently elected to arbitrate and determine as well a dissolution of the said copartnership, and a remuneration to either party, and the cancelling of the indenture of copartnership, as of and concerning all matters in difference between the parties, so as the said award should be made in writing ready to be delivered to the said parties on or before the 29th day of *February* then instant. It then further stated, that the arbitrator, in pursuance of the submission, duly made his award in writing of and concerning the premises so to him referred, and thereby did (amongst other things) award that the Defendant should pay unto the Plaintiff 500*l.* and that the same should be paid, or secured to be paid, unto the Plaintiff, (subject to the deduction of 155*l.* 9*s.* 11½*d.* thereinafter mentioned,) within one week from the date of the award: and also that the Plaintiff should pay, or allow unto the Defendant, out of the said sum of 500*l.*, 155*l.* 9*s.* 11½*d.* for monies drawn out of the trade by the Plaintiff. It then averred as a breach, that the Defendant did not, nor would within one week from the date of the award, or at any other time whatsoever, pay, or se-

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cure to be paid, unto the Plaintiff the said sum of 500*l.*, subject to such deduction as aforesaid, according to the tenor and effect of the award. To this declaration the Defendant demurred.

Marshall Scrjt., in support of the demurrer, objected, 1. That one of the matters submitted was, to arbitrate a dissolution of partnership, which it was imperitave on the arbitrator to do; and that it did not appear by the award, as stated on the face of the declaration, that he had so done. 2. That the award was void for uncertainty, inasmuch as it did not positively direct whether the money should be paid, or only secured to be paid. 3. That it was not final. [Upon the first point, *Heath* J. remarked that the submission was not imperative on the arbitrator to award a dissolution of partnership.] An award is clearly void for uncertainty, which orders that the party shall give security, as a bond, *Samon's case*, 5 *Co.* 77*b.* It is equally incompetent in this case, as in that, for either the Plaintiff or the Defendant to assess the penalty in which the security shall be given. [*Heath* J. observed that the case cited was not the case of an award to do one of two things, in the disjunctive, as this was.] The distinction there taken is important, between such things as a man binds himself to do by his own covenant, and such things as he shall be bound to do by the award of another. For if a man covenant with *B.* to enter into a bond for the peaceable enjoyment of certain land, the penalty in the bond shall be the value of the land; but the Court must look into the judgment of arbitrators, and see whether it attains that certainty which is the object of litigation. *Thynne* v. *Rigby*, *Cro. Jac.* 314. An award was, that the Defendant should give security to the Plaintiff for the payment of 16*l.* at two days; and it was agreed by all the Judges and Barons, upon error brought, in the Exchequer-chamber, that it was a void

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arbitrement for the uncertainty, inasmuch as it did not shew what security he should give, whether by bond or otherwise; and every arbitrement ought to be certain, that the party may know what he ought to perform. In the present case it would be necessary to appoint a new arbitrator, to determine in what sum the security shall be given. 2 *Bulst.* 260. *Duport* v. *Wildgoose.* Award that the Defendant should pay such a sum of money unto the Plaintiff, and that he should give security for the payment. *Coke* J. This is, as to the awarding of security, a clear void award; for the arbitrator by his award cannot enforce the Defendant to give security to the Plaintiff. 2. *Str.* 1024. *Tipping* v. *Smith*, an award that the Defendant should give security to pay the Plaintiff an annual sum for life, on demurrer, was held ill for uncertainty, because it did not determine what security should be given, *Bedham* v. *Clarkson*, 1 *Ld. Raym.* 123. an award to deliver up *quoddam scriptum obligatorium, vel quandam billam obligatoriam, quod prius habuisset*, was held too loose a description. The arbitrator must have intended to give the Defendant his option, whether he would pay the money or give the security: if the Court should decide that he was bound to pay within a week, it would deprive him of this option; if he exercises his election to give security, it is impossible to say what the security shall be; he may tender a note of hand, a bond, a collateral security; the Plaintiff may reject them, and insist on having a mortage: no one can decide between them what it shall be.

Shepherd Serjt. *contrà.* The declaration only states that the arbitrator awarded this payment, *inter alia*, and therefore it is not necessary to set out any other parts of the award than those on which the *gravamen* is founded. *Litt. Rep.* 312. *Leake* v. *Butler.* The Defendant is at liberty to shew the residue of the award in his plea, if it

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is material for him. The award is good: the only question is, whether it is vitiated by being in the alternative. This case differs from those which have been cited: if an award be so uncertain that a party cannot know which of two things he is to do, it is bad; but unless the matters awarded to be done on one side go to the whole justice of the case, and be the whole consideration, so that the other matters cannot consistently with justice be separately performed, an award may be good in part, and bad in part. *Pope* v. *Bret.* 2 *Saund.* 291. Award that the Defendant should pay to the Plaintiff the money due to him for task work and day work, and that the Plaintiff should pay the Defendant 25*l.*; and that each should mutually release the other. There the balance to be paid to, or received by, the one party, could not be ascertained till the debt of the other was rendered certain: but where there are several things which do not go to the whole of the award on one side, the award may be good for part only, as in 2 *Wils.* 267. *Fox* v. *Smith*, where an award was made for payment of 16*l.* 10*s.*, and the costs of a cause, and that thereupon mutual releases should be given; and it was held that although the costs had not been reduced to a certainty, either by the award, or by any subsequent taxation, a breach of the bond was well assigned upon the failure of payment of the 16*l.* 10*s.* So in 2 *Wils.* 293. *Addison* v. *Gray*, where an award was to pay 4*l.* 15*s.*, and the costs of an action in an hundred court, which could not be afterwards ascertained by taxation, yet it was held that a breach was well assigned upon the default of payment of the 4*l.* 15*s.* though the award might be bad for the residue. The same point is determined in 3 *Lev.* 413. *Bargrave* v. *Atkins*. In all the cases cited on the other side, the subject matter of the award was uncertain. It is to be inferred from the case of *Thynne* v. *Rigby*, that before the days appointed for payment, the action was brought upon

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on default of giving the security; but if the action had not been commenced until after the days of payment, the Court would not have so decided. In the case of *Tipping* v. *Smith*, the difficulty was, to know in what sum the party should be bound for payment of the annuity; but there is no difficulty in knowing how to perform this award. 12 *Mod.* 585. *Lee* v. *Elkins*. Award that the Plaintiff should deliver to the Defendant a certain deed concerning the title of land in question, or pay the Plaintiff 50*l.*; the deed was in the power of a third person; and it was objected that the award was therefore void. But *Blencowe* J. held the award good, for it did not positively order the delivering up of the deed, but that the Defendant should do that, or pay 50*l.* Thus, in the present case, the Defendant may discharge himself of the obligation to give security, by paying the money.

Marshall in reply. In the case of *Pope* v. *Bret*, two things were to be done, to pay for the task work, and to pay the 25*l.*, and one being bad, the whole award was held void; therefore that is a strong authority for the Defendant. *Lee* v. *Elkins* is merely the case of a penalty. The doctrine of the cases which have partially supported awards appears bad in principle; good sense and policy, and public convenience, require that they should be construed as judgments, and if not wholly good, be wholly set aside.

MANSFIELD C. J. The case on this award turns on a very few words. The real question is, what was the intention of the arbitrator, as expressed in this declaration, respecting this sum of 500*l.* to be paid to the Plaintiff. At first I feared this came within the same class of cases as *Thynne* v. *Rigby*, and that it was uncertain, because it did not point out what security was to be given. But the

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the award is, that the Defendant shall pay 500*l.* and that the same shall be paid, or secured to be paid, within one week from the date of the award. Who is to settle what the security shall be? Certainly the man to whom the sum is to be paid. The true meaning, therefore, is no more than to say, it shall be paid within a week; for if the security offered should please the Plaintiff, he would take it without any direction from the arbitrator. Though much weight is due to the authority of *Croke*, probably, if the case reported there were a new case, it would be decided otherwise: the Courts have sometimes been very strongly inclined against awards, as carrying away causes from their own jurisdiction to the decision of private persons, but they now give these instruments a more liberal construction.

HEATH J. concurred in opinion with the chief justice. If one of two matters is awarded in the disjunctive, and one alternative is impossible or uncertain, that alternative must be taken which can be performed.

CHAMBRE J. expressed the same opinion. A great deal of nicety prevailed in the old cases respecting awards; but the rigour of that interpretation has for a long time been gradually relaxing; and the Courts are now come to a mode of considering them, more consonant to common sense. But even in the earlier cases, so long since as in *Roll's Abridgment, Arbitrement, L.* it was in some cases held that unless there was a clause *ita quod fiat de præmissis*, it was sufficient to make the award good, that one point was decided, provided it was not necessary, in order to make the award just, that the others should be decided also. In the case of *Payne* v. *Cook*, adjudged many years since in the Exchequer-chamber, many points relating to awards were to be decided on; and amongst others

others this general doctrine was strongly laid down, that as there was no clause in the submission providing that the award should be made on all the points submitted, if the matters omitted were not necessarily dependant on, and connected with, the other points, the award should be sustained.

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Judgment for the Plaintiff. (*a*)

(*a*) *Lawrence* J. was absent.

DOE, on the Demise of PITCHER, *v.* DONOVAN.

May 8.

On a letting of a house from year to year, to quit at a quarter's notice, the quarter must expire with a year of the tenancy.

THIS was an ejectment brought to recover the possession of a house and shop on *Ludgate-hill*. Upon the trial of this cause at *Guildhall*, at the Sittings after last *Hilary* term, before *Mansfield* C. J., it appeared, that *Fearns*, who was the owner of the premises, had some years since let them to *Pitcher*, as tenant from year to year, by parol. *Pitcher* let the premises to *Quell*, from *Michaelmas* 1802, at 50*l*. a-year, to quit at a quarter's notice; and *Quell* had let to *Donovan*. At *Lady-day* 1808 *Quell* gave to *Pitcher* a quarter's notice of her intention to quit at *Midsummer* 1808, and to *Donovan* a quarter's notice requiring him to quit at the same time. The jury found a verdict for the Plaintiff.

Manley Serjt. had on a former day obtained a rule *nisi* to set aside this verdict and enter a nonsuit, upon the ground that the notice to quit in this case was insufficient, because the quarter did not end with a year of the tenancy.

Best Serjt. shewed cause. In a contract with a servant for a year, where the agreement is for a month's warning, it is not necessary that the month should end with the

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Doe dem. Pitcher v. Donovan.

the year. [*Heath* J. mentioned the case of *Dann* v. *Spurrier*, 3 *Bos. & Pull.* 399., where it was determined that the terms of a demise are to be taken *fortissimé contra proferentem*, and therefore where two periods of quitting may be designated by the same words, the tenant shall have his option, in which sense he will take them.] That case decides only, that the words of every contract are to be taken most strongly against the contracting party, and therefore if the tenant undertakes, as here, to quit at the end of three months, it must mean at the end of any three months, and such clearly was the intention here; and when contracting parties deviate in their terms from the contract which the law would raise for them, it must be intended that they mean something different from that. The general rule of law, therefore, which applies to tenancies from year to year, is not applicable here, and must be laid quite out of the question. The duration of the possession cannot vary the nature of the contract. The special contract, under which the tenant entered, must be taken to continue throughout the tenancy. If the question were upon the loan of a horse, or any other subject to which the cases on notice to quit do not apply, there could be no doubt on it.

Manley, contrà. From the nature of the premises it must be inferred that the parties designed to let them for at least one year certain, and not for so short a period as three months only. The contract differs from the usual letting from year to year in this circumstance alone, that each party agrees to recede three months from the common term of the notice to quit. The continuance of the possession for two years and more may be considered as explanatory of the meaning of the parties. All the cases agree, that the notice, whether for three or six months, is referable to the expiration of the year. But there is only one case which at all resembles this. *Shirley* v. *Newman*,

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Newman, 1 *Esp.* 266., there the rent being made payable quarterly, with a stipulation for three months' notice to quit, the tenant at *Christmas* gave notice of his intention to quit at the *Lady-day* following, and Lord *Kenyon* C. J. presumed an acquiescence, and a dispensation of the longer notice. So, 1 *Esp.* 94. *Doe d. Perry* v. *Hazel.* Ejectment for a house taken for one month, under a stipulation for a month's notice to quit; it was held that the notice is in all cases referable to the time of letting. The time of notice, therefore, in all cases of letting for a year, ends with the year, except in the case of lodgings; if it where otherwise the quarter's notice might be computed from any one day in the year, which would produce inextricable confusion, inconvenience, and uncertainty.

MANSFIELD C. J. At the time of the trial it was a question what was meant by the quarter's notice. I thought it meant a quarter of a year, ending at any time: but that interpretation certainly admits of the question raised by the Defendant's argument, whether it shall be a quarter of a year's notice, ending, not at one of the four most usual days of payment in the year, but in the middle of what is usually called a quarter: the evidence given was of a quarter's notice, leaving it entirely to the law to ascertain the meaning of the expression; and as there is no satisfactory explanation that this contract for a quarter's warning had any other meaning than that which the general law gives it, we think it better to hold, (and certainly it is the most rational interpretation,) that the notice to quit was intended to expire at the end of the year, and consequently a nonsuit must be entered.

CHAMBRE J. observed, in the course of the argument, that the meaning of the quarter's notice depended upon the whole contract: if it was a tenancy from year to

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year, with a quarter's warning, it would be a quarter ending with the year: but if it were a demise for one year only, and then to continue tenant afterwards, and quit at a quater's notice, it would be a quarter ending at any time. He also observed, that *Quell*, who had given his landlord this notice of quitting, had no reversion in him.

Rule absolute.

May 9.

HUTCHINSON *v.* BELL.

If *A.* make an inquiry of *B.* as to the circumstances of *C.* with respect to opening an account with him as a general customer, and *B.* fraudulently misrepresents them, in consequence of which *A.* sells *C.* goods from time to time, and is afterwards a loser by him, an action lies for the deceit, although the buyer pays for the first parcels of goods, on the purchase of which the reference is made.

But the Defendant is liable only within a reasonable time, and to a reasonable amount.

If one who has sold goods on the representation of another concerning the buyer's circumstances, afterwards tells the buyer he will sell him no greater amount without further references, and after that entrusts him to a greater amount, the author of the misrepresentation is not liable beyond the sum due at the date of the Plaintiff's declaration.

THIS was an action in which the Plaintiff claimed a compensation from the Defendant, for having knowingly given a false character of a person named *Solomon Young*, upon the credit of which the Plaintiff was induced to trust him with goods which he had not paid for. Upon the trial of this cause at *Guildhall*, at the Sittings after last *Hilary* term, before *Mansfield* C. J. it appeared that *Young* had applied to the Plaintiff, in *April*, to sell him goods, and having looked out certain articles to the amount of 60*l.* had referred him to the Defendant for his character. Upon enquiry made, the Defendant informed the Plaintiff, that he believed *Young* had done well, and had purchased the lease of his house. The Plaintiff observed to him, that in opening an account with another, the difficulty was not so great in getting

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paid for the first goods, as in closing the account. It was true that *Young* had purchased the lease of his house, but the Defendant knew that in order to pay for it he had borrowed the money, out of which the Defendant had himself lent him 140*l.* and he also knew that *Young* had immediately afterwards mortgaged his lease. It also appeared that the Defendant had frequently been bail for *Young*, and had declared that he was desirous to keep him afloat. The five first parcels of goods which *Young* bought, amounting to 106*l.* were regularly paid for. On the 30th of *May*, the Plaintiff having then entrusted him to the amount of 84*l.*, *Young* called and looked out certain other goods; but before they were delivered, the Plaintiff wrote him a letter, in which he informed him, that on looking at his account he found it extended as far as he could afford to go without a reference more satisfactory; and he therefore requested payment, at two and a half *per cent.* discount, for the goods which *Young* had that day applied to purchase. *Young* called on the third of *June*, and made a payment to the Plaintiff, and purchased a parcel of goods. He also paid the Plaintiff on account generally, in the months of *June*, *July*, and *August*, several sums of money. In the month of *November*, *Young* was declared a bankrupt: at the time of his failure he was indebted to the Plaintiff in 193*l.* 2*s.* 3*d.* out of which sum 21*l.* 15*s.* 6*d.* was for goods sold on the 3d of *June*. The defence set up was, that *Bell* was answerable only to the amount of the first parcel of goods delivered, and no further, and that all the subsequent credit had not been given upon the faith of the Defendant's representations, but on other circumstances, which must be inferred from the Plaintiff's conduct; since the letter of the 30th of *May*, as the Defendant contended, was a refusal to trust him any longer, upon the Defendant's repesentation, with the money he then owed: or at least it must be presumed, since the Plaintiff had afterwards

wards trusted *Young* further, that *Young* had found other means to satisfy him of his credit. *Mansfield* C. J. left the interpretation of the letter to the jury, and they found a verdict for the Plaintiff for 84*l.* only, being the sum due at the time of writing this letter.

Best Serjt. on a former day, had obtained a rule *nisi* to set aside this verdict and enter a nonsuit, upon the ground, that either the Defendant's liability extended only to the first parcel of goods delivered, or at most, it ceased on the 3d of *June*, when a new credit, he said, was opened.

Shepherd Serjt., now shewed cause. The verdict is right in law, and warranted by the evidence. A case may exist, in which a person may mean to represent that credit may safely be given for a particular parcel of goods; in another case he may mean that general credit is to be given. Which of these was the case here is plain from the conversation between the Plaintiff and Defendant; for the Plaintiff told him it was not so much the payment for the first parcel of goods, about which he was solicitous, as it was the closing of the account. If under these circumstances the liability were to be confined to a single transaction, it would facilitate enormous frauds, and give a Defendant the complete success of his misrepresentation; for it would only be requisite that he should furnish money for the first payment, and the person trusted would be enabled to obtain goods to any further amount. But the evidence here proves the subject of enquiry to have been, whether the Plaintiff might open an account with *Young*, and go on dealing with him from time to time. Thus would the matter have stood but for the Plaintiff's letter; and upon that the question arises, whether it meant that he would not any longer trust *Young* at all upon the Defendant's representation,

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ation, or that he would not trust him beyond a limited amount upon that credit, and was therefore desirous to receive payment for the goods last furnished; and it is clear that the latter is the true meaning: for otherwise he would have required immediate payment for the sum then due. If the Plaintiff, being informed that he might trust this person to the amount of 100*l.*, should entrust him to the amount of 1000*l.*, it could not be on the credit of the Defendant's representation, but on some other ground; but here it appears, that after he had required instant payment for the goods bargained for on the 30th of *May*, there was a current account kept open as to the goods previously sold, and in the following months several payments are made on account, to keep down the credit within due limits. It is not necessary to contend that this credit could last for ever: a credit may continue so many years that it would be absurd to refer it to the original representation; but here the representation is made in *April*, and all the dealings cease in *November*. There was pregnant evidence that the Defendant received the benefit of this misrepresentation. The Defendant contended at the trial, that all the credit beyond the 84*l.* was given upon some other representation; and if the jury believed that, they have acted properly in confining the Plaintiff's damages to the previous credit.

Best and *Vaughan* Serjts. *contrà*. To enable the Plaintiff to succeed in this action, it is not sufficient for him to shew that the representation has been fraudulent, nor is it sufficient to shew that he has sustained damage, but he must shew that the damage has been sustained in consequence of the fraud, and not in consequence of his own gross negligence. *Per Croke J. Bailey* v. *Merrell.* 2 *Bulst.* 95., where a carrier received a cade of woad, with an assurance that it weighed 8 cwt., and it in fact

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weighed 20 cwt. and two of his horses were thereby killed; and it was held he should not recover for the deceit, because it was his duty to weigh it himself. The proper limitation of this action now is, that if a trader immediately gives credit on the representation, and it is false with the knowledge of the party who made it, he may recover; but if he takes time to enquire, then, and in all cases, so soon as he has other means and opportunities to satisfy himself of his chapman's character, the author of that representation is discharged. *Pasley* v. *Freeman* 3 *Term Rep.* 64. Lord *Kenyon* C. J. there approves the doctrine of *Croke* J. It cannot be contended that this warranty is to be perpetual, and if not, no other, limit can be laid down than to confine it to the single transaction upon which the reference is made. The circumstances of a merchant daily fluctuate; and it would be of the most dangerous example if the representation, intended to be confined to one transaction, could be extended into a perpetual guaranty of his solvency. The action has never yet been pressed to the extent which is now contended for. In *Pasley* v. *Freeman*, *Tapp.* v. *Lee*, 3 *Bos. & Pull.* 370, *Eyre* v. *Dunsford*, 1 *East*, 324., and all the modern cases on this subject, the liability has not been extended beyond the first parcel of goods; and the principle has been established, that where the Plaintiff has other opportunities to satisfy himself, he must not neglect them, and that the action is only maintainable where the evidence absolutely excludes the negligence of the party; but where it is possible that negligence should be the cause of the loss, the Defendant is absolved from his liability. These goods were evidently furnished, not on the credit of the representation, but on the credit of the account current; nor is there a trader in *London* who will not, without any enquiry, entrust goods to the amount of 500*l.* to one who has purchased goods to the amount of 100*l.* and

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paid for them. If the payments were made on the general account, these very goods were in part paid for. It would be unreasonable that the Plaintiff, continuing to deal with *Young*, should permit him always to remain indebted in 84*l*., intending to resort to the Defendant for that amount. This was not, however, the meaning of his letter, the intent of which was, that either their dealings must cease, or he must have a further reference; and since he proceeded to deal with *Young*, it is plain he must have had a further foundation for giving this extended credit. In the case of *Tapp* v. *Lee*, the Court granted a new trial on payment of costs: because, though the Defendant had clearly been guilty of a fraud, there was reason to suspect that the Plaintiff himself had been too eager to obtain this sort of security, and had practised a trick on the Defendant.

Upon the motion for the rule *nisi*, *Heath* J. remarked, that if the action could be at all maintained, it would be very inconvenient to limit it to the goods first supplied: for he had seen many cases of conspiracy to defraud tradesmen, in which the goods first delivered were always punctually paid for.

MANSFIELD C. J. observed, that this was a new action, and went further than any case hitherto decided; and that the effect of the evidence was to shew a treaty for entering into an account with this man as a general customer, and not an inquiry directed merely to the payment for one parcel of goods.

Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court.

One point, on which I had doubts at the trial, has since been fully considered; namely, whether the credit given on a representation of character is to be confined

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to the first parcel of goods. I have always doubted of the utility of entertaining such actions as have been supported in the late cases of this sort, because they have the effect of enabling a man to do that indirectly, which the statute of frauds expressly forbids to be done in direct terms, to guarantee the debt of another. Nothing could be more dishonest than the Defendant's conduct respecting *Young*: he knew him to be insolvent, yet he represented him as thriving and flourishing; he stated as a proof of it, that he had bought the lease of his house, although he knew that he had borrowed the money to buy it, of which he had himself lent him 140*l.* There is much weight in the evidence of the witness who stated, that the Plaintiff expressed his apprehension of the great difficulty of closing an account once opened; and considering that, I think it is reasonable to make the Defendant answerable for the credit given to *Young* on the faith of that representation, provided it be not carried to an unreasonable extent, and be confined to a reasonable time. The letter is important, and I think the jury have put the right sense on it. I left it to the jury to say whether it meant more than this, not that the Plaintiff would no longer trust *Young* with the sum then due, but that he would not give him credit for a greater sum than was then due; and the jury put the latter sense on it. Two sums of money are afterwards paid, one in *July*, the other in *September*. Neither is paid specifically on account of this debt of 84*l.*, but on the general account. And where a person pays money, not specifying on what account it is paid, it is in the power of the person who receives it to apply it to whatever account he pleases: therefore the Plaintiff is entitled to apply these payments to the goods last delivered: consequently the verdict found at the trial is right, and the rule for entering a nonsuit must be

Discharged.

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May 9.
Motions to put off trials must be made in bank, when they can, not at *nisi prius*.

THE Court desired that for the future it might be understood as a general rule of practice, That no motion to put off a trial would be entertained at *nisi prius*, when the motion could be made in bank, in term time.

PARKIN *v.* SCOTT.

May 12.

If a Plaintiff discontinue an action stayed in another court by a consolidation rule, and commence an action against the same Defendant for the same cause in this Court, the Court will stay proceedings until after the trial of the cause mentioned in the consolidation rule.

LENS Serjt. had on a former day obtained a rule *nisi* that all proceedings in this cause might be staid until the fifth day of the term next after the trial of the cause of *Parkin* v. *Grieves*, then pending in the Court of *King's Bench*. The Plaintiff had commenced an action in that court against the present Defendant on a policy of insurance, and another on the same policy against *Grieves*. The proceedings in the former were stayed by a consolidation rule until the latter should be tried; and after issue joined in the latter, and while it was in course to be set down to be tried at the Sittings after the present term, the Plaintiff discontinued his action in the King's Bench against *Scott*, and commenced the present action in this court.

Shepherd Serjt. shewed cause. If this conduct be any contempt of the order of the Court of *King's Bench*, it is for that Court to notice it. But it would be competent to contend, even in that court, that it is perfectly open to the Plaintiff to discontinue there, and to choose what other jurisdiction he will. He has in fact taken this measure, because his witnesses are going abroad, and he saw an earlier prospect of trying the cause in this court.

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Lens Serjt. *contrà.* The Court will take care, not only that the Plaintiff does not violate the letter of the consolidation rule, but that he shall not by any contrivance attain the same end.

The Court admitted, that in general it was competent for a Plaintiff to sue in one court, although actions were pending on the same subject in another; but that in the present case there could be no other object in view than vexation, since the Plaintiff could have no reasonable hope to obtain an earlier trial in this court than in the *King's Bench.* And therefore, though it was true that nothing was expressly said in the consolidation rule about suing in the Court of *Common Pleas*, the rule would be nugatory if it were not to prevent the Plaintiff from suing in any other court. That must have been intended, and therefore the present rule must be made

Absolute.

May 12.

CASWELL *v.* COARE.

Upon the breach of the warranty of a horse, if the horse is returned, the measure of damages is the price paid for him.

If the horse is not returned, the measure of damages is the difference between his real value and the price given.

If the horse is not tendered to the Defendant, the Plaintiff can recover no damages for the expence of his keep.

THIS was an action upon the warranty of a horse, sold by the Defendant to the Plaintiff for the sum of 20*l.* Upon the trial of this cause at the Sittings after last *Hilary* term, at *Guildhall*, before *Mansfield* C. J., the warranty and unsoundness were proved; no tender had been made of returning the horse to any person who could be identified with the Defendant as his agent. Whereupon *Cockell* Serjt. contended, that the Plaintiff could recover nothing for the keep of the horse; and

that

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that if the Plaintiff took the 20*l.* the horse must be returned. *Best* Serjt., on the other hand, contended, that the Defendant was not entitled to a return of the horse, unless he paid for his keep in the interim. *Mansfield* C. J. directed the jury, that if the horse was returned to the Defendant, the price of the horse ought to be given: if the horse was kept, the verdict ought to be for the difference between the value and the price. The jury, contrary to this direction, found their verdict for the Plaintiff with 30*l.* 10*s.* damages, being 20*l.* for the horse, and 10 guineas for its keep. *Cockell* in this term obtained a rule *nisi* to set aside the verdict and have a new trial; upon this application, it appeared that the horse had stood, both before the commencement of the action, and since the trial, at a livery stable, the keeper of which would not deliver up the horse, unless paid for his keep; but that immediately after the trial the Plaintiff had given the Defendant's attorney notice that the horse was there, and that he might go and take it there, but not accompanying the notice with any offer to pay for its keep.

Best now shewed cause. The Plaintiff does not proceed upon a dissolution of the contract, but he contends that the expence of the keep of the horse is one of the consequences of the breach of the contract. He also relied on the notice given immediately after the trial. He again offered that the Defendant might take the horse.

Cockell contrà. That will not do: the horse must be delivered to the Defendant,

MANSFIELD C. J. The contract being broken, the Defendant must give back the money, and the Plaintiff must return the horse; but unless the Plaintiff has previously tendered him, he cannot recover for the keep; because

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because it was not the Defendant's fault that the Plaintiff kept him. When the warranty was broken, the Plaintiff might instantly have sold the horse for what he could get, and might have recovered the residue of the price in damages. All that can now be done, is to reduce the damages to 20*l.*, and to let the horse be re-delivered.

LAWRENCE J. If the Plaintiff buys the horse, it is his own, and he must keep his own horse as long as he has it.

Rule absolute to reduce the verdict to 20*l.*, the Plaintiff undertaking to deliver back the horse free of any expences for its keep.

BOWCHER *v.* NOIDSTROM.

May 13.

If one of a ship's crew does a wilful act of injury to another ship, without any direction from or privity of the master, trespass cannot be maintained against the master, although he was on board at the time. The master of a ship is not discharged of his responsibility for the acts of his crew, although done under the direction of a pilot, who, by the regulations of a statute, supersedes the master for the time in the government of his ship.

THIS was an action of trespass, brought by the Plaintiff, who was owner of a vessel called the *Providence*, against the Defendant, who was master of a *Swedish* ship lying in the river, to recover a compensation for the damage which the Plaintiff had sustained by the cutting away of part of his mainsail by a person on board the Defendant's ship. The Defendant pleaded the general issue. Upon the trial of this cause at *Guildhall*, at the Sittings after last *Hilary* term, before *Mansfield* C. J. it appeared that while the Plaintiff was endeavouring to steer his vessel between the Defendant's ship, which lay at anchor, and another, he fell athwart the hawse of the Defendant's ship, the gib boom of which went through the Plaintiff's mainsail. After his vessel had been entangled

in

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in this way for half an hour, a pilot who was on board, and had the care of the Defendant's ship, gave directions to one of the crew to cut away; and the man to whom he gave the direction, immediately cut five or six clews of the Plaintiff's mainsail, and part of his boom. The Defendant's ship was in no danger, and it was probable that the Plaintiff could, without this operation, have extricated his vessel in the space of another hour. The Defendant was at that time on board, but he was asleep in his bed, and gave no orders throughout the whole transaction. With respect to the captain's liability, *Mansfield* C. J. was of opinion, that although there was a pilot on board, the pilot does not represent the ship, and that the master was still answerable for every trespass. The jury found a verdict for the Plaintiff.

Vaughan Serjt. had, on a former day in this term, obtained a rule *nisi* to set aside the verdict, and have a new trial, upon two objections. 1. That the action ought to have been brought against the pilot, not against the captain; because the stat. 3 *G.* 1. *c.* 13., which compels the captain to take on board a pilot in order to come up the *Thames*, and supersedes his authority while the pilot remains on board, thereby also takes off the captain's responsibility for acts done during that time. 2. That the action ought to have been case, and not trespass. *Hugget* v. *Montgomery*, 2 *New Rep.* 446. [*Lawrence* J. mentioned, with relation to the first point, the case of an action brought against the captain of the *Russel* man of war, for running down the *London East Indiaman*. The captain was sleeping in his cabin: the lieutenant of the watch had the command of the ship; and it was urged that the captain was not liable for this misfortune, inasmuch as the lieutenant was not his servant, being put in by the Admiralty: but the objection did not prevail, and he was held liable.]

Shepherd

1809.

NOIDSTROM.

Shepherd Serjt. now shewed cause. An action upon the case could not have been maintained here, for this was not an act of negligence, but a wilful cutting: trespass, therefore, is the right action; and if the Defendant relied upon any supposed necessity for cutting away the sail, he ought to have pleaded it in justification. In the case of a sheriff, trespass lies against him for the act of his bailiff.

Vaughan, contrá.

The Court held that as it did not appear that the captain had done any act in this case, the rule to enter a nonsuit must be made

Absolute.

May 15.

KIRTLAND *v.* POUNSETT.

In *assumpsit* for use and occupation, it is not necessary to state in what parish the premises are situated.
And if the parish is described by a wrong name, it is immaterial.
At least if it be described by a name generally known, and which could not therefore mislead the Defendant.

THE Plaintiff declared upon the use and occupation of a house in the parish of *Lambeth*. Upon the trial of this cause, at the Sittings for *Middlesex*, after the last *Hilary* term, it was proved that the name of the parish was *St. Mary, Lambeth*, and this variance being considered as fatal, the Plaintiff was nonsuited.

Shepherd Serjt. having in this term obtained a rule *nisi* to set aside the nonsuit, and have a new trial,

Best and *Onslow*, Serjts., shewed cause. They were prepared with many affidavits to prove that the right name of the parish was *St. Mary, Lambeth*. It is true that in 1 *Bos.* 225. *Burbidge* v. *James*, which was an action for a nusance done to a house alleged to be in *Sheerness*: the house appeared to be in the district of

Sheerness,

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Sheerness, but not in the parish of *Sheerness*; and it was held sufficient to satisfy the description: but it has always been the opinion of the profession that in the action for use and occupation, as much certainty is necessary in the description of the premises, as in trespass. The declaration states the premises to be in the parish of *Lambeth*: now the name of a parish is always taken from the parish church, and the parish church is named *St. Mary, Lambeth*. In *Frith* v. *Gray*, 4 *T. R.* 561 *n.* the description of the county in which *Barnet* common was situated, was mere surplusage: but in the action for use and occupation it is always necessary to state the parish: it has been the uniform practice, and undoubtedly there is some good reason for it.

Shepherd Serjt., *contrà*. In several local acts of parliament this parish is called the parish of *Lambeth*; and where a parish is known as well by one name as another, it is sufficient to call it by either.

MANSFIELD C. J. The question is, whether in this case we shall relax that which is a well known, but inconvenient, rule, that in the action for use and occupation the Plaintiff shall designate the parish in which the house is situated, by its right name? This case steers clear of that class of cases where there is a wrong name given, which might mislead the Defendant. The name of *Lambeth* is much better known than that of St. *Mary, Lambeth*; and the question is, whether it be not sufficient to call it by that name, by which all mankind call it.

LAWRENCE J. As to the necessity of alleging the parish in which the premises are situated, in 6 *East*, 347. *King* v. *Fraser*, it is decided, that in the action for use and occupation it is not necessary to name the parish.

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In an action upon the case, brought by Dr. *Leigh*, president of the college of physicians, against the Defendant for practising as a physician within seven miles of *London*, without licence, to wit, in the parish of *St. George in the East*: it appeared the name of the parish was *St. George's*: and the variance was held immaterial.

Rule absolute.

May 15.

TOPHAM *v.* BRADDICK.

If goods are consigned to a factor for sale on commission, the law will raise a contract to account for such as are sold, to pay over the proceeds, and to deliver the residue unsold, *on demand*.

And an action does not lie against him for not accounting, till after demand made of an account.

Therefore the statute of limitations runs only from the time of a demand made.

After a reasonable time elapsed, a jury might presume that the consignor had made a demand, and that the factor had accounted.

And 14 years would be a sufficient time for such a presumption.

If it were not rebutted by circumstances.

THE declaration in this case stated, that in the lifetime of *William Cox*, since deceased, who in his lifetime was a partner with the Defendant, to wit, in *August* 1795, in consideration that the Plaintiffs, at the request of *Cox* and the Defendant, had consigned and delivered to them certain goods to be by them sold and disposed of, for and on the Plaintiff's account, for certain commission; *Cox* and the Defendant undertook to render to the Plaintiffs a just account of the sale of such of the goods as should be sold and disposed of, and to pay over the proceeds thereof, and also to return to them such of the goods as should remain unsold and undisposed of, when they, *Cox*, and the Defendant, should be thereto afterwards requested: the declaration then averred a request made to the Defendant since the death of *Cox*, to wit, in *April* 1808, and a refusal. The Defendant pleaded, 1. The general issue. 2. That the action did not accrue within six years. Upon the trial of the cause at *Guildhall*, at the Sittings after last *Hilary* term, before

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Mansfield C. J., the Plaintiff proved the consignment to have been made at the time stated in the declaration, with an invoice, in which *Cox* and the Defendant were made debtors for 91*l*., the amount of the goods, but there was no proof of any special contract as to the terms of the commission. It was also proved that *Wood*, another creditor, who had made similar consignments in 1795, had in 1801 applied to *Braddick* for payment of his debt, and had then received for answer that he could get no account from *Cox*, but that when he did he would dissolve the partnership and pay the creditors. The partnership was dissolved in 1802, and *Cox* died in 1804. In *April* 1808, the Plaintiffs applied by letter to the Defendant for an account of the sales, and payment of the proceeds, and for re-delivery of such part of the goods, if any, as might be yet undisposed of. To this letter the Defendant returned no answer, and there was no proof that he had in any manner admitted his liability within the last six years. *Vaughan* Serjt. for the Defendant, contended, that it ought to be presumed from the lapse of 15 years since the delivery of the goods, that the Plaintiff had made a demand at some time before, and that the Defendant had accounted. The jury, under the direction of *Mansfield* C. J., who thought that the cause of action was not complete till a demand made, found a verdict for the Plaintiff.

Vaughan, in this term, obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the same objections which he had made at the trial.

Shepherd and *Best*, Serjts., now shewed cause. The words of the statute of limitations are, "within six years "next after the cause of action." That must mean a clear and complete cause of action. This cause of action was not complete till long within six years before the

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commencement of the suit. It might be extremely difficult to say at what time the Plaintiff was entitled peremptorily to demand an account: the law would say it must be within a reasonable time; but when that period arrives, the Plaintiff must mark it by an act of his own, by a request to account. If a debt is immediate upon some particular event, as the delivery of goods sold, or the arrival of a pay-day fixed by the contract, no demand is necessary, and in that case the statute would operate from the time fixed; but this is not a contract that the Defendant will, within a given time, account; when can it be said that this Plaintiff had a complete right of action? Certainly not upon the instant delivery of the goods. And if not then, what other period is to be assigned from which the six years can be computed? It was necessary that the Plaintiff should ask for an account, before he could sue for the neglect to deliver it, he could not maintain this action with averring in his declaration the demand of an account, and that which is material to be averred, is also material to be proved; and if he had sued without such previous request, the want of it would have been a good defence. The cause of action, therefore, is complete only from the time of the demand. In 1. *Bl. Rep. Fenton* v. *Emblers*, Lord *Mansfield* C. J. held that the statute of limitations runs only from the time of a contingency happening, not from the time of the promise; consequently, unless it can be shewn that the Plaintiff had applied for the account more than six years before the commencement of this suit, the statute of limitations does not protect the Defendant. The request made in 1801 was not made on account of these goods.

Vaughan Serjt. *contrà*. There was no precise evidence of the contract stated in the declaration: the only evidence was, that other persons had dealt with *Cox and*

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Braddick on these terms. But supposing the contract proved, more than six years have elapsed since the cause of action was complete: for the Defendant promised generally that he would pay all the partnership debts upon the dissolution of the partnership. That event took place in 1802, and the cause of action became complete upon that contingency happening, since which more than six years have elapsed. According to the Plaintiff's argument, thirty or fifty years would not do away the cause of action. But the law requires that at all events the goods must be either sold or returned within a reasonable time, and as so many years have elapsed, it ought to have been left to the jury to presume whether a demand had not been made before. In 1 *Salk.* 421. *Green* v. *Revett,* Lord *Holt* said that the statute of limitations, upon which the security of all men depends, was to be favoured. Presumptions ought, therefore to be raised in favour of it; and as it is a remedial statute, it ought to be liberally construed. If a promissory note is made payable on demand, a previous demand is not necessary: the commencement of the action is a sufficient demand. 12 *Mod.* 444. *Collins* v. *Benning* the Court held that if the promise were for a collateral thing, which would create no debt till demand, it might be necessary for the Defendant to plead that he had not promised within six years after demand made; but there it was an *indebitatus assumpsit,* which shewed a debt at the time of the promise, and, therefore, a plea of *non assumpsit infra sex annos* was good. The case cited from *Blackstone* is not applicable.

MANSFIELD C. J. It would be too much to say that we could find a period, which must be between 1801 and the present time, when the Plaintiff could have brought an action: the Defendant's own case proves that

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the Plaintiff was to do a collateral thing, and that no action lay till demand. How and when was the demand to be made? The only person who could know the state of the consignment, had neglected, according to the Defendant's own statement, to render any account, up to the year 1801. In that year, *Wood*, who stood in the same predicament, though not in the same contract, with the Plaintiff, made a demand, not with any view to found this action; and the Defendant then said he could get no account from *Cox*. If *Cox* had then rendered no account of the goods of *Wood* and others, there was little ground for the jury to presume that he had rendered any account of the Plaintiff's goods. *Wood* waited three or four years before he sued (*a*), with the hope that the Defendant might receive an account from *Cox*. Why then are we to fix on any particular period after 1801, and before this action brought, at which we may presume that the Defendant did account? Or why are we to presume that an earlier demand was made by the Plaintiff, when it appears that none was made by the other creditors? And the case in 12 *Mod.* shews there must be a demand made. There is no ground, therefore, to direct a jury to presume that any account had been rendered, nor would they have presumed it if they had been so directed; for strong evidence was given against it, by the Defendant's assigning the reasons why he had not accounted.

HEATH J. was of the same opinion. In ordinary cases it might be presumed, from length of time, that the consignee had accounted. But a demand must be either proved or presumed, in order to give the Plaintiff a cause of action; and what reason had either my lord or the

(*a*) *Ante*, 104. *Wood* v. *Braddick*.

jury

jury to presume a demand in this case? The only probable presumption was, that the parties had accounted, and the circumstances disproved that.

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LAWRENCE J. The action would not lie at the end of a week from the delivery of the goods: this is not like the case of money lent, which is recoverable the next week. The goods were not delivered to be accounted for on the next day; they were to go to a distant country to be disposed of, and considerable time must be allowed for their arrival there, for their sale, and for the return of the account. I remember an action of trover between Lord *Bute* and Mr. *Wortley Montague*, for furniture left for many years in a mansion-house. The statute of limitations was set up; but the demand and refusal proved were of recent date, and the Plaintiff recovered. There, no demand and refusal were presumed to have been made at any time before, for the possession was in its commencement a legal possession.

CHAMBRE J. concurred. It is perfectly clear from the case cited by *Vaughan*, that the statute could not run from the beginning of the contract. The space of fourteen years might have given ground for an inference that all had been fully accounted for and paid: for by an account, I think, is meant, not a piece of paper, but payment. But there is evidence that the Defendant had complained that *Cox* had not remitted the proceeds, or rendered any account, which repelled the presumption. The Plaintiff, therefore, is entitled to his verdict, and the rule must be

Discharged.

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(IN THE EXCHEQUER CHAMBER.)

May 12.

GOODRIGHT, on the several Demises of LIVERSAGE FOWLER, Esq. and ROBERT BURTON, Esq., v. GEORGE FORESTER, Esq. and JAMES CLAYTON.

If an estate, which is turned to a right of entry by a fine, can be devised, the devisee must enter within the same time, within which the devisor must have entered, if living.

A., tenant for life, with remainder to his own executors for 40 years, with remainder to *B.* in fee, levies a fine with proclamations. After the fine, *B.*, without entering, devises to *C.* for life, with remainder to *D.* in tail, and dies living *A.* *A.* dies; *C.* does not enter then, or within five years after the expiration of the 40 years. Held that *D.* is barred, and cannot enter within five years after the death of *C.*

Whether a right of entry be devisable. *Dub. per Mansfield* C. J.

THIS was a writ of error, brought to reverse a judgment of the Court of King's Bench, given in this ejectment upon a special verdict. The substance of such parts of the verdict as related to the points discussed in the arguments reported below was, that *Richard Brown*, being seised in fee of the manor of *Lawley*, with the appurtenances, in the parish of *Wellington*, and also of a certain tenement called *Hunt*'s and *Jones*'s tenement, situate in the same parish, being the tenement mentioned in the last count of the declaration, and which tenement was then parcel of the manor of *Lawley*, in the year 1677 made his will, and thereby charged all his real estate in *Lawley* with the payment of certain legacies, and directed that immediately from and after payment thereof, "the entire "lordship or manor of *Lawley*, aforesaid, (excepting the "estate thereinafter devised to *Anne Browne*, *Philip* "*Browne*, and *Eleanor Browne*, in and to the tenement "of them, or one of them, thereafter limited and appointed, should descend and come to *Robert Browne*, "his eldest son, as his lawful right and inheritance, to "have and to hold the said manor of *Lawley*, and all "other the said premises (except as thereinafter ex- "cepted), to the said *Robert Browne* and the heirs of his "body lawfully to be begotten for ever," with remainders over: "except and always reserved out of that

"grant,

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" grant, all that one tenement, with all and every the " lands and appurtenances thereto formerly belonging, " formerly known by the name of *Hunt*'s and *Jones*'s " tenement: all which last excepted messuage, lands " and premises, and every thereof, the testator did there- " by give and bequeath unto *Anne* his wife, *Philip* his " son, and *Eleanor* his daughter, for the term of the " natural lives of them the said *Philip* and *Eleanor*, and " the longer liver of them; and after the decease of the " survivor of them the said *Philip* and *Eleanor*, then the " reversion and remainder of the said excepted messuage " and premises to remain and to be to the executors " and assigns of the said *Philip* for the term of 40 years, " he the said *Philip Browne*, paying to his said sister " *Eleanor*, or her executors, the sum of 100*l*. of lawful " money for increase of her portion." That the testator afterwards, in the same year, died seised of the manor of *Lawley* aforesaid, and the said tenement called *Hunt*'s and *Jones*'s tenement, whereupon *Robert Browne*, his eldest son and heir, entered into the manor of *Lawley*, and *Anne Browne*, *Philip Browne*, and *Eleanor Browne*, entered into the said tenement, and became and were seised thereof for the natural lives of the said *Philip Browne* and *Eleanor Browne*, and the life of the longer liver of them; and the said *Robert Browne* being so seised of the said manor, and entitled to the said tenement called *Hunt*'s and *Jones*'s tenement as aforesaid, subject, as to the last mentioned tenement, to the estates, terms, and interests given and created in and by the will, in *Michaelmas* term 1677, suffered a common recovery to the use of himself and his heirs of the manor of *Lawley*, with its appurtenances, and all other the messuages, lands, tenements, and hereditaments whatsoever in *Lawley* aforesaid, which at any time theretofore were the inheritance of *Richard Browne*, and whereof he the said *Robert Browne* stood seised of any estate of inheri-

 tance

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tance in possession or reversion: that *Robert Browne* being so seised and entitled of *and to* the manor of *Lawley*, and *Ann Browne*, *Philip Browne*, and *Eleanor Browne*, being so seised of *Hunt*'s and *Jones*'s tenement, and the said *Robert Browne* being so entitled in remainder to the same tenement, *Robert Browne*, in 1682, by his will, devised to *Thomas Langley* and *Charles Cludd* (*inter alia*) all the manor of *Lawley*, messuages, lands, and tenements, and all other his lands, messuages, and tenements, situate in *Lawley*; and also all other his messuages, lands, or tenements whatsoever in *Wellington*, or elsewhere in the county of *Salop*, with their appurtenances, to hold unto the said *Thomas Langley* and *Charles Cludd*, their heirs and assigns for ever, in trust, by the perception of the profits of the premises, or by the sale thereof, at their discretion, to pay and satisfy his debts, legacies, and funeral expences: that *Robert Browne*, in 1682, died so seised; and that *Langley* and *Cludd* thereupon, by lease and release, of the 30th day of *June* and 1st of *July* 1683, conveyed to *Thomas Burton*, in fee, the manor of *Lawley*, with its appurtenances, and all messuages there, and all lands, tenements, and hereditaments whatsoever, situate within the township or manor of *Lawley*, or which were the messuages, lands, tenements, and hereditaments of *Richard Browne*, within the manor of *Lawley*. That *Anne Browne* and *Eleanor Browne* died in 1723, whereby the said *Philip Browne* became sole seised of the said tenement for the term of his natural life, the reversion thereof belonging as aforesaid. And the said *Philip* being so seised; levied a fine *sur conusance de droit*, with proclamations in *Hilary* term, 7th *Geo.* 2. 1733-4, in which *William Forester* Esq. was Plaintiff, and *Philip Browne* and *Simon Browne* deforceants, of the same tenement, to the use of *William Forester*, and his heirs; whereupon the said *William Forester* entered and became seised of the

same

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same tenement, of and for the estate acquired to him by the said fine: that *Thomas Burton, being so seised of the manor of* Lawley, *and the premises bargained, sold, and released as aforesaid,* in 1735 made his will, duly executed, whereby he devised the manor of *Lawley,* and all other his manors, messuages, tenements, and hereditaments, to the use of *Robert Burton,* father of the above-named *Robert Burton,* one of the lessors of the Plaintiff, for his life, and from and after his decease to the use of *William Taylor,* and *Thomas Fowler,* and their heirs, during the life of the said *Robert Burton* the father, in trust to preserve contingent remainders, and from and after the decease of the said *Robert Burton* the father, to the use of his first and other sons, severally and successively, in tail male: and that *Philip Browne* died in 1738, and that *William Forester,* being so seised as aforesaid, in 1758 made his will duly executed, and thereby devised the said tenement unto the said *George Forester* and the heirs of his body, and afterwards in the same year died so seised; upon whose death the said *George Forester* entered into the same tenements, and became and was seised thereof, to wit, of such estate therein as could or might lawfully pass to him by virtue of the said last-mentioned will: that *Thomas Burton* died in 1735, and that *Robert Burton* the father died in 1803, and left issue of his body the said *Robert Burton,* one of the lessors of the Plaintiff, his eldest son and heir at law, who, in 1805, entered upon the premises in order to avoid all fines levied thereof by *Philip Browne* and *George Forester,* or either of them, or any other person or persons, and being so possessed thereof, devised the same tenement to the Plaintiff. In *Trinity* term 1808, the Court of King's Bench gave judgment for the Defendant. *Vide* 8 *East,* 552. The causes of error assigned were, that, in the giving of the judgment, it was affirmed, that the reversionary estate and interest of the said *Thomas Burton* in the

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the tenement was an estate and interest not deviseable by his will, whereas, by the law of the land, as the Plaintiff averred, it was such an estate and interest as was deviseable.

The case was argued in *Hilary* term 1809, in the absence of *Heath* and *Lawrence*, Js., by *Benyon* for the Plaintiff in error. The only question is on the effect of the fine levied by *Philip Browne*. It is not true that the interest which *Thomas Burton* had after that fine levied, and before actual entry made, could not pass by grant; but even if that were so, it does not follow that it could not be the subject of a devise. There is no disseisin in this case; because the jury have specially found that *Thomas Burton*, at the time of making his will, and of his decease, was "seised of the manor of *Lawley* and the premises so bargained, sold, and released to him as aforesaid," by which they have virtually found, that after the fine levied by *Philip Browne*, *Thomas Burton* re-entered and re-instated himself in the possession, a point which escaped notice on the discussion in the court below, so that the question intended to be made in this cause, does not at all arise. 2. The fine levied by the tenant for life did not devest the remainder or reversion. 3 *Bl. Com.* 169. Disseisin is defined to be a "wrongful putting out of him that is seised of the freehold." *Co. Litt.* 277. *a. acc.* This act then, being committed, not by a stranger, but by the tenant of the freehold himself, cannot work a disseisin. Or, 2dly, if it can, it is only a disseisin at election: for it must be remembered, that there are two species of disseisin known to the laws; the one an actual forcible disseisin, the other a disseisin at the election of the disseisee; and all disseisins wrought otherwise than by the actual forcible putting out of him that hath the freehold, are disseisins at election only. A fine, which is a matter that passes *sub silentio* in the court at *Westminster*, cannot work an actual disseisin

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In this case, the party entitled made his election not to be disseised, which he indicated by making his will. The doctrine of Lord *Mansfield*, in the case of *Taylor ex dem. Atkyns* v. *Horde*, 1 *Burr*. 105. has been reprobated he went so far as to suppose that a man who was actually disseised, might elect to say he was not disseised: here he was mistaken indeed; but it will not be contended that there is not in the law such a title as disseisin at election; and although that case may in some points be questionable, the present argument is not thereby affected. *Blunden* v. *Baugh*, 1 *Ro. Ab.* 661. 9 *Vin.* 102. *Cro. Car.* 304. recognized in *Carter* 162. *Barnes* v. *Freeman*. Tenant at will made a lease for years, not an innocent conveyance by bargain and sale, but a common law lease, and it was held that it wrought no disseisin except at the election of the disseisee, although the conveyance were such as may well pass a greater estate than the lessor hath; and it was admitted that the owner might at his election conceive himself disseised. Lord *Mansfield* acknowledges this case to be good law. It was there held competent for the owner to grant his reversion, before he had done any act to avoid the lease for years. *Powsley* v. *Blackman*, 1 *Ro. Ab*. 661. 11 *Vin*. 102. *Palm*. 201. *Cro. Jac*. 659. Mortgagor by bargain and sale, being in possession, before any day of payment, leases for six years; creating thereby a greater estate than his own interest, which has been said by Lord *Mansfield* to be *quâ* a tenancy at will, or what the old books call a tenancy by sufferance: the lessee enters, holds, pays rent, and at the end of the term surrenders the possession to the mortgagor, who had failed to pay the money at the day stipulated; the bargainee does not enter, but devises the land, and it was held that he was not disseised by the lease; but that if he were, he was reinstated by the re-entry of the mortgagor, and therefore a good devise. All the books make a dis-

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a distinction between a right of entry and a mere right of action. In this case, to take the point most strongly against the Plaintiff, the testator had a right of entry, and was not reduced to a mere right of action; for the tenant for life, not having an estate of inheritance, could not discontinue, so as to put him to his right of action, 1 *Lev.* 36. *Stephens* v. *Brittridge*, where the case was, that *A.* being tenant for life, with remainder to his wife for life, with remainder to their issue in tail, with remainder to *C.* in fee, *A.* and his wife levy a fine to the issue in tail with warranty; and it was held, not only that this wrought no discontinuance, nor tolled the entry of the remainder man in fee, and put him to his right, but that it did not even devest or displace his estate, and that it was an innocent conveyance, and each party passed by it that which he might lawfully grant: and *Twisden* J. said that if there were any displacing or devesting of the remainder, yet it was only at the election of the remainder man; so that if he should bring formedon and admit himself out of possession, perhaps the warranty might be pleaded in bar; but there he had entered, and did not admit the estate to be out of him, and had thereupon brought his ejectment. This case shews, 1. That the doctrine of election applies as well to a disseisin wrought by a fine, as to that which might be affected by a common law lease or feoffment. 2. That the doctrine of disseisin at election was familiar to the courts in those days, and consequently, it is the law now also. 3. The act of tenant for life did not devest the estate of the remainder man, because it was by fine, which is an innocent conveyance. This position is confirmed by *Bredon's case*, 1 *Co.* 76. There are two periods at which the tenant in remainder might enter: either within five years after the fine levied, or within five years after the expiration of the particular estate. The remainder man might either take advantage of the

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forfeiture upon the fine being levied, or he might elect that it should not operate as a forfeiture. *Thomas Burton* did not take advantage of this forfeiture, but entirely waived it, and, inasmuch as by his election he has affirmed the act of the tenant for life to be a lawful act, no estate was thereby devested. This is clearly to be deduced from the two cases last cited. If, however, it should be held, that the doctrine of disseisin at election does not apply in this case, but that this fine operates tortiously, as a common law conveyance, and not as an innocent conveyance, nevertheless a right of entry, although not grantable, is still capable of passing by devise. The Courts might have had much difficulty some centuries ago in coming to this decision; but the liberality of modern times has construed wills in many instances with a latitude that would formerly have been denied to them; and it is not too much to ask, that in the same spirit they will support a devise of such an interest as this. A contingent or executory interest would not formerly have been deemed the subject of devise. But in *Jones* v. *Roe, Lessee of Perry*, 3 *T. R.* 88. S.C. 1 *H. Bl.* 30., both Courts held that a possibility coupled with an interest is devisable. The words of the statute of wills, 32 *H.* 8. *c.* 1., are, "persons having any manors, lands, "tenements, or hereditaments." It has been supposed that there would be a difficulty in pronouncing that the interest of *Thomas Burton* came within the description of manors, lands, tenements, or hereditaments. But Lord *Kenyon* C. J., in *Jones* v. *Roe*, properly says, the statute means persons having *an interest in* the lands. And it is demonstrable that a person having a right of entry has an interest in the lands. The whole of that judgment bears strongly on the present case, and the Plaintiff might safely rest on it. Whatever is transmissible is devisable. There is no question but that this interest would have been descendible: and, consequently, if this case had

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come before Lord *Kenyon* for his decision, to preserve consistency with his judgment pronounced in *Jones* v. *Roe*, he must have said that this interest was devisable. The judgments of *Ashurst* and *Buller* Js. in the same case strongly corroborate this argument. The latter observes, that the statute enables a testator to devise all hereditaments; that is, every interest that can pass from ancestor to heir. If it be descendible, it would be strange to say that it is not also devisable. It is important to examine what is the nature of that interest, which is called a right of entry. It is sufficient to support a subsequent estate of freehold. *Fearne*, 1. *Cont, Rem.* ed. 4. 430, states, that "although "every contingent freehold remainder must be supported by a preceding freehold, yet it is not necessary "that such preceding estate shall continue in the actual "seisin of its rightful tenant: it is sufficient, if there "subsists a right to such preceding estate at the time "the remainder should vest; provided such right be a "right of entry, and not a right of action only; for "whilst a right of entry remains, there can be no doubt "but the same estate continues, since the right of entry "can exist only in consequence of the subsistence of the "estate." The author then cites the cases which prove this proposition. Nor is the argument at all affected by the common case, where a tenant for life, with a contingent remainder over, levies a fine which destroys that estate, because it is necessary that the contingent remainder should vest *eo instante* when the preceding estate ceases, or it will be destroyed. *Smith* v. *Coffin*, 2 *H.Bl.* 461. Upon the stat. 13 *Eliz. c.* 7., which enables the commissioners of bankrupt to dispose of whatever property or interest the bankrupt "may lawfully depart "withal," it was held that a mere right of action after the right of entry was barred by the statute of limitations, passed by a bargain and sale made by the commissioners to the assignees, and passed by the name of an heredi-

hereditament. Under the statute of wills, therefore, as it has been interpreted by Lord *Kenyon* and other judges, who have held a much less important interest, namely, a contingent possibility, to be devisable, this is a devisable interest: it is hereditament, and ought to pass by this will.

Preston, contrà. As to the supposed conclusion of the special verdict, that *Thomas Burton* died seised, the verdict does not find that he died seised of this tenement, but of the manor only, and the tenement had been severed from the manor. *Litt. ss.* 590. 591. *Bro.* tit. *Comprise, pl.* 19. If a lease for term of life, or a gift in tail, be made of parcel of a manor, there, during that interest, this land is not parcel of the manor in possession, but the reversion is parcel of the manor; and where disseisin or feoffment on condition is made of parcel of a manor, this is not parcel of the manor till regress. 11 *Rep.* 47. *Liford's* case, is still more strongly in point. If a man be disseised of an acre, parcel of his manor, although the acre, in right, is parcel of the manor, yet if *A.* enfeoffs another of his manor, the right of that acre shall not pass, but is severed from the manor for ever. In this case the Defendant's conusor had the tenement. The other points in the case are, 1. Whether the testator's estate was turned to a right of entry by the fine. 2. Whether a right of entry is devisable. 3. Whether the Plaintiff is not barred by the statute of nonclaim, a point which has not yet been considered. 1. It is now settled, and even admitted by the former argument for the Plaintiff that this fine could not have been avoided without an actual entry. This of itself proves that the Plaintiff had no seisin till entry. The necessity, and for that reason, the sole object of the entry, is to regain a seisin which has been devested. Whenever there has been a disseisin, there must, by the rules of the common law, be a re-entry, before any act of

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of ownership which depends on the existence of a right to the actual seisin, (as the making of a lease for years, to try the title in ejectment,) can be exercised, or an action of trespass can be maintained. When there is a disseisin only at election, then, in point of fact and of law, the seisin is never changed. It is optional in the party to consider his seisin as continuing, or to admit himself disseised, for the sake of trying his title by an assize, instead of pursuing some other remedy. To trace this point to its principle: Investiture, in the feudal language, is of the same import with seisin; or, to use the language of Lord *Mansfield*, 1 *Burr.* 107. seisin is the completion of the investiture by which the tenant is admitted into the tenancy: it is the consummation of an act or conveyance. Whoever is seised is invested: hence the distinction adopted by our law, between interests which are vested and interests which are not vested. All interests of freehold which are vested give an actual seisin; in other words, an estate: every estate, therefore, is a seisin in fact or in law, and is a vested interest. By livery on the land, a seisin in fact always passes; so, by a tortious entry, claiming the freehold, the fee is gained, and every disseisin gains a fee simple, except it be the disseisin of a tenant for life, or for any other particular estate, claiming his estate only. An heir, a remainder man, &c. before entryhas only a seisin in law. Interest which are not vested, as contingent remainders, future and executory uses, and interests by executory devise, do not confer any seisin, though they may confer a contingent or executory interest. Contingent and executory interests are sometimes termed contingent and executory estates. This, however, is an inaccurate expression. To devest, implies the privation of seisin; and the law has carefully distinguished between estates which are vested, and that species of title which emains after an estate is devested. While the estate is vested,

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vested, the owner retains the seisin of the estate: when the estate is devested, he no longer retains any ownership or seisin; for seisin and ownership are convertible terms. He has merely a right or title of entry: to make that right available and restore his seisin, he must re-enter. On his re-entry, (unless the right of entry be taken away, as it may be by a descent cast,) the seisin or estate will be revested. Hence the distinction between seisin and disseisin. Disseisin is the privation of seisin; it is the commencement of a new title, under a new seisin. It supposes a change of seisin from the rightful owner unto a wrong doer, who is termed in law the disseisor. There are four species of actual disseisin, three by strangers, and the fourth by particular tenants connected in privity of estate. The first sort is where a man enters on the immediate freeholder and ousts him: this is called, generally and emphatically, disseisin. The 2d is where a stranger enters on the seisin in law which an heir takes on the death of his ancestor: this is called abatement. The 3d is on the seisin in law of a remainder man or reversioner, on the determination of a particular estate: this is called intrusion; and this term is applied to the king, though he cannot be disseised. The 4th is discontinuance by tenant in tail, husband seised in right of his wife, and discontinuance or deforcement by tenant for life. It has been attempted to confine the meaning of discontinuance to the act of tenant in tail, but it is to be extended to the disseisin which is by the act of tenant for life also. The distinction between deforcement and discontinuance properly is, that by deforcement the seisin of those in remainder is changed into a right of entry; discontinuance changes the seisin into a mere right of action, so that no entry can be made; and the remedy is by real action instead of an ejectment or actual entry. Every discontinuance is a disseisin, but a disseisin is not necessarily a discontinuance. The best law writers, how-

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ever, on tenures, have treated deforcement as a discontinuance, or as a species of discontinuance. Thus *Littleton in s.* 592. treats of discontinuance, and *Coke* (on *Lit.*) 325. says, " he," *Littleton*, " useth discontinuance " for a devesting or displacing of the reversion, though " the entry be not taken away." Discontinuance is defined by *Finch's Description of Common Law*, title *Discontinuance. Shep. Abr. chapter Discontinuance, p.* 135. *Argt.* 33. It is necessary clearly to distinguish between disseisin in fact and disseisin at election. Disseisin at election is well known to the law, but it is, where there is no disseisin in fact. *Litt. s.* 279. *Co. Litt.* 181. *a.* 153. *b.* 1 *Burr.* 110. This species of disseisin has been introduced merely for the sake of the remedy, that the disseisee may have his assize; and a liberal construction, as Lord *Mansfield* observes, 1 *Burr.* 110., extended this remedy, for the sake of the owner, to every trespass or injury done to real property. The principal subjects of those disseisins at election were denial of rents, either in gross, or annexed to reversions, estovers, corodies, and other incorporeal hereditaments, and sometimes, though rarely, the pernancy of profits of land, where a man entered and took the profits, without claiming the freehold; such as a lease for years by a man having no title, for there was no new reversion, as in *Blunden* v. *Baugh*; but if in that case he had made a lease for life, it would have been an actual disseisin, because of the livery. Such also was a lease by a guardian, a tenant holding over, &c. There is one instance of an actual disseisin of rent, as rent. If a stranger disseised the lord of his manor, he thereby gained actual possession of the manor, but not actual possession of the rent, which was parcel of the manor, unless the tenant attorned, and then it was an actual disseisin of the rent, and yet it continued to be at the option of the lord, whether he would consider himself as disseised or not. *Litt. s.* 587. *Co. Litt.* 322. *b.* 323. *a.*

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In *Co Litt.* 153. *b.*, a distinction is taken between disseisin and dispossession. *Litt. ss.* 486, 487. illustrates this difference. *Litt.* 587. by attornment of the tenant and the death of the disseisor, the disseisee loses his distress for his rent: this is a disseisin in fact. But if one holdeth of me by rent service, which is a service in gross, and not parcel of my manor, and another disseiseth me by taking of the rent, and dies, I may distrain after his decease : this is a disseisin at election. Hence it is evident, that in the case of a rent in gross, there never could be a descent to toll an entry. The next proposition is, that the feoffment, and other tortious conveyances of the tenant for life, work a wrongful alienation, and do not operate merely as a rightful conveyance. Inasmuch as a tenant for life has the freehold, his alienation has the same effect as the alienation of tenant in tail, with this difference only, that the tenant in tail, being seised by force of the gift in tail, may by his alienation turn the reversion into a right of action ; while the tenant for life, seised by force of his freehold, can only turn the reversion into a right of entry. At common law, indeed, tenant for life could have annexed a warranty to his alienation, and barred his sons by collateral warranty. *Litt. ss.* 697. 727. *Co. Litt.* 365. *b.* 381. *b.* By the statute of *Gloucester* this was restrained, as to tenants by the courtesy. *Co. Litt.* 365. The like restraint was put upon jointresses by the st. 11 *H.* 7. *c.* 10. *Co. Litt.* 381. *b.* Lastly the stat. 4 & 5 *Ann. c.* 16. restrained all tenants for life. The law has taken great notice of the title of the alienee of tenant for life ; for he is in by title in the same estate as the alienee of a disseisor ; consequently he stands in a more favourable point of view than a mere disseisor. A fine levied by tenant for life has a tortious operation like a feoffment, and is not, as it has been said, merely an innocent conveyance, an assertion which was never before heard of. On the contrary, a fine, when levied

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by particular tenants has always been considered as a tortious conveyance. In *Fermor*'s case, 3 *Co.* 78. *b.* the right of tenant for life to levy a fine and bar his lessor by nonclaim is acknowledged. This, as Lord *Mansfield* observes, 1 *Burr.* 109., was on account of the confidence and privity of estate between tenant for life and the reversioner and the notoriety of his investiture. If tenant in tail makes a lease for years of land, and after levies a fine, this is a discontinuance; for a fine is a feoffment of record and the freehold passeth. *Co. Litt.* 332. *b.* Forfeiture may be where a greater estate passeth by livery than the particular tenant may lawfully make, whereby the reversion or remainder is devested, as by alienation by feoffment, fine, or recovery by consent. *Co. Litt.* 251. *a.* And though in the case of *Hunt* v. *Bourn*, 1 *Salk.* 341., the Court denied the propriety of calling a fine a feoffment on record, they admitted that it had the effect of a feoffment to some purposes, if he that levied the fine was seised of the freehold at the time of the fine levied. Lord *Coke* (*Co. Litt.* 251. *b.*) divides alienation by tenant for life into two sorts, viz. by alienation devesting, or not devesting; devesting, as by levying a fine, or suffering a common recovery of lands, whereby the reversion or remainder is devested; not devesting, as by levying of a fine in fee of an advowson, rent, common, or any other thing that lieth in grant. The case of a fine is better than the case of a feoffment, because on the alienation a fine is paid, and the conusee comes in, (by presumption of law, and formerly, in fact,) with the assent of the lord. But the tenant for life had this disposing power only while he was actually seised of the freehold. And it is important to observe, that after a disseisin nearly all the rights and privileges of ownership are transferred from the disseisee to the disseisor. For the disseisee, until he has re-entered, cannot lease, cannot charge by grant, *Perk.* s. 65.; or take a release of

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a rent-charge, *Perk. s.* 594., reversion, or a right of action, cannot be tenant to the *precipe*, 6 *Co.* 59.; cannot even endow, *Perk.* 426. His right gives no title of dower; he cannot give seisin of a rent by attornment. 6 *Co.* 59. *Brediman's* case. And although he may, on account of his privity, accept a release of services, *Co. Litt.* 268., he cannot accept of a release of a reversion. If there be a feoffment made by livery of seisin by disseisor and disseisee, it is the feoffment of the disseisor. *Perk. s.* 157. Otherwise, if the disseisee re-enter before the feoffment. *Perk.* 690. If a reversioner disseises his tenant for life, he hath a new estate under a new title, and cannot grant his reversion *eo nomine*. *Hob.* 323. A recovery, or fine levied to a stranger, may operate by estoppel to extinguish his title. *Buckler's* case, 2 *Co.* 56. *Moor's* case, *Palm.* 365. *Weale* v. *Lower*, *Pollexf.* 54. His right is no assets till recovery. 6 *Co.* 58. *Perk, s.* 270. Before acceptance of the disseisee as tenant, the lord may treat either the disseisor or disseisee as tenant. Hence he may have escheat on the death of the disseisse without heirs: but after acceptance of the disseisor, the disseisor alone is tenant: and the alienee of the disseisor is tenant, for he comes in by a feudal contract to which the lord hath consented. On the other hand, the disseisor may lease, charge, endow alone, *Perk*, 426.; may take a release from the disseisee, a stranger, or the lord of the fee; is alone tenant to the *precipe;* may give seisin of a rent, 6 *Co.* 58. *a.* Dower assigned by him without covin binds the disseisee. 6 *Co.* 58. *Co. Litt.* 35. *Perk.* 394. He may accept a release of services. His feoffment is good. *Perk.* 157. *Litt. s.* 476. If disseisor and dissejsee join in an exchange, it is the exchange of the disseisor. *Perk.* 280. His wife is dowable, and his assignment of dower is not avoided by his taking a release from the disseisee. *Co. Litt.* 278. *b.;* but if the disseisee had entered, the dower would have been avoided. His fine will be good, and

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will confirm his title by nonclaim. His estate is assets, in his heir's hands. *Perk.* 270. 6 *Co.* 58. The lord, upon his decease without heirs, shall have his escheat, for the lord may elect to affirm the feudal contract either with the disseisor as tenant *de facto*, or with the disseisee as tenant *de jure*. *Perk.* *s.* 157. If disseisor and disseisee had joined in a feoffment after the disseisee had re-entered, it would be the feoffment of the disseisee, and the confirmation of the disseisor; but if it had been before entry, it would be the feoffment of the disseisor and confirmation of the disseisee. So if the heir of the disseisor and the disseisee come on the land together to give seisin, the law will adjudge the possession to be in the disseisor, though the disseisee has *jus majus in re*. *s.* 233. And several other instances might be enumerated. It is next to be shewn, that when the feoffment of tenant for life passes a greater estate than the feoffor hath, it also devests the fee simple out of the reversioner, or remainder-man. *Litt.* *ss.* 609, 610. For it cannot at the same time be in one and the other, since there cannot be two fee simples of the same land. When tenant for life maketh a feoffment in fee, the fee simple passeth by such feoffment. *Litt.* *s.* 611. So tenant for years may make a feoffment in fee, and by his feoffment the fee simple shall pass, and yet he had at the time of the feoffment made, but an estate for term of years, &c. *Litt.* *s.* 611. : his feoffment works a disseisin to the lessor. *Co.* *Litt.* 330. *b*. Tenant for life, the remainder in tail, the reversion in fee, and the tenant for life enfeoffs him in the reversion in fee, it is a forfeiture of his estate, and shall devest the estate tail in remainder. *Chudleigh's* case, 1 *Co.* 140. 1st *res*: Lord *Mansfield* thought that most of the cases in *Littleton* applied to disseisin at election. This was true as to the chapter respecting rents, but not true as to several other chapters, as of warranty, continual claim, and several others. *Litt.* *s.* 414,

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s. 414. If a man be disseised, and the disseisee makes continual claim to the tenements in the life of the disseisor, although that the disseisor dieth seised in fee, and the land descend to the heir, yet may the disseisee enter upon the possession of the heir, notwithstanding the descent. It may appear extraordinary how the disseisor can die seised with continual claim of the disseisee, but it is because the remaining of the tenant on the land is a new disseisin, and the heir must enter within a year and a day. So, if tenant for life aliene in fee, that is, by common recovery, feoffment, or fine, the only means by which it could be done, (and this expression is material, to shew that the Defendant acquired a fee, for the descent of an estate *pur auter vie* does not toll an entry;) he in the reversion, or he in the remainder, may enter upon the alienee; and if such alienee dieth seised of such estate without continual claim made to the tenements before the dying seised of the alienee, and the lands, by reason of the dying seised of the alienee, descend to his heir, then cannot he in the reversion or he in the remainder enter. *Litt. s.* 415. Again, *Co. Litt. s.* 327. *b.* There is a diversity between an alienation working a discontinuance of an estate which taketh away an entry, and an alienation working a devesting, or displacing of estates, which taketh away no entry. As if there be tenant for life, the remainder to *A.* in tail, the remainder to *B.* in fee, if tenant for life doth alien in fee, this doth devest and displace the remainders, but "worketh no discon-"tinuance;" (*i. e.* so as to turn the estate into a right of action,) and "therein it is to be observed, that to every discontinuance there is necessary a devesting or displacing of the estate, and turning the same to a right; for if it be not turned to a right, they that have the estate cannot be driven to an action; and that is the reason that such inheritances as lie in grant cannot by grant be discontinued, because such grant devesteth no estate, but

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passeth only that which he may lawfully grant, so that the estate itself doth descend, revert, or remain." Though Lord *Coke's* observation is applied to a discontinuance which reduces the estate to a right of action, it is equally applicable, (except as to the remedy) when the estate is turned into a right of entry. The operation of innocent and rightful conveyances is materially different. A grant by deed or by fine of things lying in grant maketh no discontinuance. *Litt. s.* 618. For it is a maxim in law that no grant by deed of such things as do lie in grant, and not in livery of seisin, doth work any discontinuance. *Co. Litt. s.* 332. Every discontinuance worketh a wrong. *Co. Litt. ibid.* In *Seymour's* case, 10 *Co.* 98, Lord *Coke* shews that tenants of a determinable fee cannot devest or discontinue, because there cannot be any tortious alienation. But when tenant for life or in tail maketh a feoffment, the feoffment is tortious; for tenant for life cannot lawfully give the fee, therefore his feoffment is tortious, and in case of an estate tail, it is tortious, as to his issue, and those in remainder or reversion. Finally, Lord Chief Justice *Hale*, in *Focus* v. *Salisbury*, *Hard.* 400. observed, "The "fine here, [by tenant for years,] does not displace the "estate. As if lessee for years be, the remainder over "for life, and lessee for years levy a fine, and five years "pass, the lessor is not barred by any nonclaim, because "the fine operates nothing, and *partes finis nihil habuerunt* may be pleaded to it; otherwise it is where a "tenant for life levies a fine, for he has a freehold, and "his fine displaces the remainders; and therefore an "entry is requisite within five years after the death of "the tenant for life; and therefore when a lessee for "years or at will is to levy a fine, it is usual for the "lessee to make a feoffment first to displace the other "estates. But here the lease for years is antecedent to "the estate of the lessor who levies the fine, and he has

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" a freehold expectant upon the lease, and not precedent to it. If there be tenant for life, remainder for " years, remainder in fee to the remainder-man for " years, and the remainder-man for years levies a fine, " the estate for life will not be barred by this fine, as " hath been adjuged: but it was held in the same case " that a lease for years in possession would have been " barred, *quod non credo*. And the reason of *Blundell's* " case holds here, that a man shall not be disseised " against his will; and a fine with five years nonclaim " must bar an estate precedent to the fine, not subse- " quent to it. And there is here a privity of estate be- " twixt the lessor and lessee, and therefore the fine shall " not bar, as in case of a mortgage, where the mort- " gagor continuing in possession levies a fine. And in " the *Dutchess* of *Richmond's* case in *C. B.* this very case " was adjudged *in terminis*, for two reasons; first, By " reason of privity betwixt the persons; 2dly, Because " the lessor was in the nature of a tenant at will, and " there was a natural confidence between the parties. " If he be tenant for life, the remainder for life, the re- " mainder for life, the remainder in fee to the first " tenant for life in remainder, who levies a fine; this is " adjudged to be a forfeiture, but that it operates no " displacing. *Gallant's* case. And although in this case " the lessor be estopped, yet that is nothing to the " lessee." All the instances which have been noticed are cases of actual disseisin, as distinguished from disseisin at election; the person on whom the entry is made, or whose seisin is devested or discontinued by the operation of a feoffment or a fine, has no option whether he will deem himself disseised or not. If he had such election, he might contend that a fine levied was void for want of a freehold in the disseisor, or he might alien, &c. to a stranger, and thus introduce his grantee to contend the question of title with the disseisor. Lord *Mansfield* admitted,

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mitted, 1 *Burr.* 113., that if there had been a disseisin, there could not be a devise, without re-entry. In short, the Plaintiff would assign a right or title of entry; or chose in action, contrary to a maxim of law. In the argument of the Plaintiffs the case of *Pousely* v. *Blackman*, *Palm.* 201., also reported in *Cro. Jac.* 659., and in 2 *Roll. Rep.* 284., was strongly insisted on as decisive in favour of the Plaintiff, and as proving that a disseisee may devise. The facts of that case were, that a bargain and sale was made on condition to be void on payment of a sum of money within five years, and with an agreement that the bargainor should take the rents until default in payment of the money. The bargainor made a lease within the five years, and the lease being expired, he entered after the five years; after this entry, and without making any entry on the bargainor, the bargainor devised to *Perryman*, who was the lessor of the Plaintiff in ejectment. It was objected to the Plaintiff's title, that the entry of the bargainor was a disseisin to the bargainee, and that the bargainee had no devisable interest; but it was decided that the devise was good. This decision proceeds on the ground, that neither the lease, or subsequent entry of the bargainor, was any disseisin. In short, it was nothing more than the common case of a lease by a mortgagor, and such lease has no operation to devest the estate of his mortgagee. The reports of this case do not exactly accord: according to *Palmer*, the conclusion is, " that at last, for the inconvenience which would be in-" troduced into the state, if the bargainor might frustrate " the devise of a bargainee, by such secret act between " him and a stranger, it was resolved by *Ley* C. J. *Dod-" deridge*, *Houghton*, and *Chamberlain*, that the devise " made by the bargainee was good." But according to *Roll*, " it was adjudged that the devise was good," but the Court did not say on what ground. And *Croke* gives this solution as the result of the case, " that by " this

" this means many assurances would be destroyed, which " the law will not suffer; wherefore the law accounts " that the bargainor by his entry is in of his former estate, " and the will of the bargainee is good: and by all the " four justices it was adjudged for the Plaintiff." From this comparison of the reporters, it is evident that the Court came to the determination that there was no actual disseisin; that at the utmost it was a desseisin only at election, and 1 *Ro. Abr.* 661. *Disseisin, H. pl.* 3. 4. abridges the case accordingly. In *Blunden* v. *Baugh, Cro. Car.* 304. the learning of disseisins, and the difference between actual disseisins and disseisins at election was fully considered. The point of that case is, that a person being tenant at will, made a lease for years, and it was the opinion of the Court that no actual disseisin was committed; and much discussion took place in regard to the person who should be deemed the disseisor. The distinctions to be collected from this case are, that no one who enters, claiming a term for years, or who makes a lease for years without first making an entry to gain the freehold, can be deemed an actual disseisor; so no person who receives rents, can merely by that circumstance be an actual disseisor. But the case of *Blunden* v. *Baugh* is particularly important to the defendant, as it contains a comment on the recent determination in *Pousely* v. *Blackman*. And the report proceeds to give it as the opinion of all the judges, that if the bargainee had been disseised, the devise had been void; and it shews the consequence of there being no disseisin, viz. that the freehold remains in the former owner. At this period, the reason which governed the decision in the case of *Pousely* v. *Blackman*, must have been well known to the bar and to the Court; and from the opinion of the Court in *Blunden* v. *Baugh*, and from the uniform opinion expressed by subsequent Judges, including Lord *Holt*, the conclusion is, that a disseisee has no deviseable

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interest; and *Pouseley* v. *Blackman*, so far from establishing the right of a diseisee to make a valid devise, is an authority that no disseisin had been committed, but the possession of the bargainor under the agreement, (which in the report is called his *former* estate,) was in point of law, the seisin of the bargainee. 2dly. In answer to the position, that every interest which is decendible is deviseable, it is to be answered, that a right of entry, like a right of action, is not deviseable. The policy of the law is in favour of this proposition; no rent can be reserved to a stranger, nor could the alienee of a reversion at common law enter for condition broken. *Litt. ss.* 346, 347. This matter was much discussed in *Portington*'s case, where it was designed as the means of creating a perpetuity. 10 *Co.* 35. *Acc. Jermyn* v. *Arscot,* 1 *Co.* 85. *Moor.* 364. *Litt.* 347. *Co. Litt.* 215. *a.* A distinction is taken on the statute of wills, 32 *H.* 8. *c.* 34. that a stranger, the devisee of the reversion, for life or years may take benefit of a condition created on a lease for years: but a grantee of part of the reversion, as of one acre out of three, shall not. Before the statute of wills there was no mode of making a will of a legal estate, but by means of a custom; but under the custom, as under the statute, it was necessary that the devisor should be seised at the time of making his will. Fortunately one case is preserved of a devise before the statute of wills. 39 *H.* 6.18. *b. pl.* 23. wherein it was held to be a good plea against a devise, that the testator did not die seised; and the reporter is also of opinion, that it would have been a good plea that he had nothing in the lands at the time of making the devise, as if he had been disseised before the devise made, and had re-entered after the devise. *Bunker* v. *Cook.* 11 *Mod.* 123. *acc.* (which case is better reported at the end of *Gilbert on Devises.*) And there is this good reason for the decision, that the devisor must be seised as well when he makes the

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the devise, as when he gives effect to it by his decease; though Lord *Holt*, without departing from the principle, thought that if he be disseised, and then devise, and afterwards re-enter and die seised, this shall purge the disseisin, and make the will good by relation *ab intio*. 11 *Mod*. 128. Lord *Eldon* Chancellor, in 8 *Ves*. 282. *The Attorney General* v. *Vigor*, was of opinion, with Lord *Holt*, in the last cited case, that a right of entry was not deviseable, and that if a devisor had been disseised, and had not re-entered, the will would have continued revoked, because at his death he had nothing but a right of entry. No argument in favour of the Plaintiff arises on the words of the statute of wills. That statute enacts, that "all persons having, or which hereafter shall have, " any manors, lands, tenements, or hereditaments, holden " in socage, and not having any manors, &c. holden of " the king by knights' service, &c., shall have full and " free liberty, power, and authority, to give, dispose, " will and devise, as well by his last will and testament " in writing, or otherwise, by act or acts lawfully exe-" cuted in his life, all his said manors, lands, tenements, " or hereditaments." This was much caught at, as a great boon to the public, and many questions arose on it. In the next session but one, a statute was made, 34 & 35 *H*. 8. *c*. 5. which explains the power given by the former to extend to all persons " having a sole estate or " interest in fee simple, or seised in fee simple or copar-" cenary, or in common in fee simple, of and in any " manors, lands, tenements, rents, or other heredita-" ments, in possession, reversion, remainder, or of rents " and services incident to any reversion or remainder." These words are incapable of being construed to extend to a right of entry: until a recent period the privilege of devising was denied by the Courts, even to persons who were the owners of contingent or executory interests. But under the word " having," in the statute of

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wills, the right of devising has been extended to persons having possibilities coupled with an interest, and to the owners of contingent and executory interests, as persons of this description. *Roe* v. *Jones*. And although the opinion of many great lawyers has been against that decision, I do not combat it. It was very proper, liberal, and reasonable. But it never was in the contemplation of the Courts to extend the right of devising to persons who had mere rights or titles of entry. It is evident, that neither Lord *Kenyon*, Chief Baron *Eyre*, or Lord *Eldon* understood the decision in *Roe* v. *Jones* to have gone to this extent. That case decides no more than that a possibility coupled with an interest, as a contingent remainder, may pass by the will of the owner. Now in point of law, though it is otherwise in point of fact, a right or title of entry is no interest, at least no interest for the purpose of disposition, though it is an interest which may be released: it is merely a naked possibility. The ownership is in the person who has the seisin, though the right of defeating that ownership is in the person who has the right or title of entry. Contingent and executory interests partake of the nature of remainders, and may be assimilated to them; and for that reason each owner has only a partial interest, and the several parts make one whole. A possibility coupled with an interest is devisable when it is part of the ownership under the seisin, that is, the two interests put together make but one fee simple. Though the law says it is not a remainder, that is only because the common law had, before the statute of wills, defined what a remainder should be; but it is analogous, and bears the same relation to the precedent estate as a remainder does. But when one person has the seisin, and another person has merely the right, there is no such divided ownership; and there cannot be two estates in fee simple of the same land; and no person has ever before endeavoured to

establish

establish a title under the will of a person who had merely a right or title of entry, or of action, either for a condition broken, or any other cause; nor is there to be found in the books a single authority in support of such right. As far as authority goes, all the books shew that it has always been considered as a clear proposition that no person can make out a title under the will of a disseisee. In *Jones* v. *Roe*, Lord *Kenyon* distinguished very correctly in saying, "it (meaning the statute of wills) "enables persons having any manors, lands, &c. to de-"vise, which must mean having an *interest* in the lands. "There are two kinds of possibilities: the one a bare "possibility, that which the heir has from the courtesy "of his ancestor, and which is nothing more than a "mere hope of succession. Such a possibility, undoubt-"edly, is not the object of disposition; for if the heir "were to dispose of it during the life of the ancestor, "though it afterwards devolved on him from his ances-"tor, such disposition would be void. The other a pos-"sibility or contingency like the present" (a contingent remainder), "and which is widely different from the for-"mer." Throughout his observations it is evident Lord *Kenyon* never meant to deny the opinion which he noticed of Lord *Holt*, in *Bunker* v. *Cook*, or the opinion in *Brett* v. *Rigden*, *Plowd.* 340., that an estate which is devested by disseisin is not devisable. When he says, "it is difficult to assign any reason why these interests should be capable of disposition by one mode and not by another," he did not advert to the case of a disseisin; all his observations are confined to contingencies like those which then were under the consideration of the Court. The observations of *Buller* J. still more fully prove that the opinion of the Court was confined to those possibilities which were coupled with an interest, and descendible. Though the terms in which these eminent lawyers have expressed themselves may seem to bear on the present

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case in favour of the Plaintiff, yet in that "sound distinction," as *Buller* J. styled it, which was taken by Lord *Kenyon*, between bare possibilities and possibilities coupled with an interest, it is evident that a right or title of entry was considered by the Court as classed under the possibilities of the former description. It was contended on a former occasion, not only that there must be an actual disseisin to prevent the right of devising; but that as long as the party has a right to enter, he has a right to devise. It was admitted, however, that after the expiration of five years the party could have no right to devise. On the part of the Defendant it is contended, that whensoever there is a disseisin, an inability to devise is created. That it exists, from the moment the disseisin is committed, and as well during the five years as after the expiration of the same. The only difference which arises from the lapse of the five years, is, that the right or title of entry is actually barred. [*Mansfield* C. J. observed, that it would not probably be denied that many authorities could be found to shew that persons disseised cannot devise; but the argument drawn from the case of *Jones* v. *Roe*, was not that this interest, was the same as that, but that the interest there devised, was not till lately held devisable, and, that by analogy, this interest, which was not formerly devisable, is now, *pari ratione*, devisable also; that whatever is descendible to the heir, is devisable by will. It does not indeed, therefore, follow, that such is the law, but it would be a singular construction at this day to say, that upon the words of a statute, which enacts that persons having lands, tenements, and hereditaments, may devise them, he who hath a reversion in fee, the highest estate in lands, to be perfected merely by entry, cannot devise them. The policy of the old law was the fear of oppression arising by grants of disputable titles; where a man had a right of entry on which there were doubts, or

or which he would not enforce himself, the law said, it should not be the subject of a grant, but that does not shew that it might not as well be devised as descend; for the same reason of inconvenience does not apply.] The judges who decided the case of *Jones* v. *Roe* never designed to extend the power of devising; Mr. *Charles Yorke*, who was a good lawyer, argued the case of *Selwyn* v. *Selwyn*, 1 *Bl.* 225., with a qualification that the interest there devised differed from a right of entry, or a right of action. *Arthur* v. *Bockenham*, *Fitzg.* 236. Lord *Trevor*'s argument proceeded on the same ground. In the case of *Taylor* v. *Horde*, 1 *Burr.* 113. Lord *Mansfield*, feeling it necessary to get rid of the doctrine of disseisin, admitted that if it had been a right of entry, it could not have been devised. He cites *Powsley* v. *Blackman*, *Palm.* 605., where it is said, that if a disseisee devise and afterwards enter, the devise is good, which *Dodderidge*, an excellent lawyer on points of real property, and the supposed author of *Shepherd's Touchstone*, denied. In the case of *Goodright* v. *Otway*, 1 *Bos. & Pull.* 594. 603. 3 *Ves. jun.* 669. *Eyre* C. B. expressly refers to the doctrine of disseisin. Lord *Eldon* decided in the same manner in the case of the *Attorney-General* v. *Vigor*; and although there was no right of entry in that case before the testator's death, it makes very little difference. *Grose* J. introduced the doctrine that an interest coupled with a possibility is devisable in the case of *Roe* v. *Jones*; and as he concurred in the judgment given below in the present case, that judgment may be considered as his own comment of equal authority explaining his own text. Rights of entry and rights of action, therefore, are *in pari lege*, neither of them devisable. Contingent remainders and executory devises are parts of the same seisin, and it is material that a devisor who devises them, devises all he ever had: not so with a disseisee. If it should be held that a right of

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entry is devisable, it will follow that a right of action will be devisable, and it will become necessary to frame a new writ, the *jus descendens* must be changed to right devised.

As to the third point, The lessor of the Plaintiff is barred by the fine levied by *Philip Browne*, by reason of his nonclaim. This argument is *primæ impressionis*: for as it never before was thought that a right of entry was devisable, there are no authorities to shew within what time it must be pursued. Here *A.*, tenant for life, with remainder to *B.* in fee, disseises the remainder-man, and the disseisee devises and dies, the Plaintiff contends that the devisee is not barred, though the heir would have been barred, if the disseisee had died intestate: but surely the disseisee cannot, by making his will, give to his devisee a longer period for recovering his estate than is given by law to the heir. If he could, how erroneous would be the practice of conveyancers, who rely on an abstract, accompanied with 60 years possession, as a secure title, whereas in this case, a purchaser, after 76 years possession, might lose his estate. The entry at the latest ought to have been made within five years after the expiration of the term of 40 years, computed from the decease of *Philip Browne*, that is, in five years after the 1st day of *July*, 1778. The tenant for life under the will of *Thomas Burton* died in 1803, and it will be urged that, therefore, the entry made in 1805 was in good time; but if this were so, it would entirely put an end to the statute of nonclaim; for by creating estates for life or in tail, the time might be prolonged *ad infinitum*. But in construing this statute of fines and proclamations, 4 *H.* 7. *c.* 24. it is to be observed that the several particular estates all make only one estate in fee simple. It is clear that if the time begins to run against the ancestor, it continues to run against the heir. If that were not so, the consequence would be still more deplorable,

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that even though the Defendant might succeed in his defence against this Plaintiff, because the five years had elapsed, yet he would be liable to the claims of subsequent remainder-men. But at the moment when the fine was levied, this statute fixed the periods, which nothing done after the fine levied could enlarge, within which the Plaintiff should make his entry, and bring his action. It may be admitted, that there were three periods of entry. 1. Immediately upon the fine levied, to take advantage of the forfeiture, committed by his tortious alienation. 2. Upon the decease of the tenant for life, because the fine extinguished the term. 3. Upon the expiration of the term of 40 years. Upon the former argument it was urged in favour of the Plaintiff, that a person who had no right before the fine, was not affected by it, and in support of it was cited the authority of *Sheph. Touchst.* 22. "Such as have neither present nor "future right at the time of levying the fine by reason "of any matter before the fine; but whose right grow-"eth entirely after, or partly before and partly after the "fine: and these are not barred at all by the fine, but "they may make their claim when they will." The author refers to *Plowd.* 538. 337. 375. 378.; but none of these cases warrant this proposition, and it is contrary to the opinion of the Court in the case of *Stawell* v. *Lord Zouch, Plowd.* 353., though it agrees with the opinion of *Plowden* himself: but *Plowden*'s opinion has been overruled, as appears by the cases cited from *Dyer*, 72. *b.* *Damport and wife* v. *Wright*, *Dyer*, 234. *a.* and *Moor*, 53. S. C. and 13 *Co.* 21. *Manvill*'s case. In *Cotton*'s case, 1 *Leo.* 211. *pl.* 297., which is cited in 2 *Inst.* 519. under the name of *Sunie* v. *Howes*, it was indeed supposed that a person might, under particular circumstances, viz. that the ancestor was under a disability, and died under that disability, be left at large, and be at liberty to claim at any indefinite time: but the law is now settled by *Dillon*

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v. *Leman*, 2 *H. Bl.* 584., that the heir must, even under these circumstances claim within five years after his title accrues: unless he labours under disabilities; and in that case, within five years after his disabilities are removed. The fair inference, then, is, that the enacting clause of the statue of 4 *H.* 7. is general and universal, and all persons are within the scope of it: so that the statute will begin to run immediately as against all persons, unless they can bring themselves within the saving clauses; and against those who are within the saving clauses, unless they make their claims and pursue their titles within the limited period adapted to their particular case. It follows also that no new cause of avoiding a fine can arise after the fine: every right of avoiding the fine must commence in the party, or his ancestor, testator, or intestate, upon a cause existing before the fine is levied: so that no alienation or disposition can be made which can introduce strangers into the situation of claiming a new title, or cause of entry, action, &c. and such indeed is the common law, which denies the right of alienation to those who have merely a right or title of entry or of action: in short, who have no estate; and it is quite clear that a fine can never operate as a bar by nonclaim against any except those whose estates are devested or discontinued before the fine is levied, or by the operation of the fine; and consequently turned into a right of entry or of action: nor is there an instance that a devisee, an assignee, or any other than a party affected by the fine, or his heir, executor or administrator, according to the nature of the interest, has ever asserted a title in opposition to a fine with proclamations which devested the estate under which the title was to be asserted. One decision goes the whole length of part of this proposition, If there was tenant for life, remainder for life, remainder in fee, if the second tenant for life do not enter upon alienation made by the first, within a year and a day, the

the remainder-man in fee was barred of his action. So that the principal of the common law was not in favour of keeping the right always open; but the tenant for life having to assert the whole right of the inheritance, did, by his laches, bar the remainder-man in fee, though perfectly innocent and unable himself to assert his own right. The periods then of entry were immutably fixed by law, and were not capable of being altered by any testamentary disposition. *Plow.* 373. "Also the word (first) joined to the subsequent words shall exclude him from the benefit of this saving; which word (first) seemed to them (the Judges) all, to be put in the statute to great purpose. And *Dyer* said, that the stat. of 1 *R.* 3. *c.* 7., made touching fines, has all the words of the purview and the body of this act, of 4 *H.* 7., except this word (first), which is added to this act of 4 *H.* 7. more than is in the said act of 1 *R.* 3., as a thing thought very necessary. And this word ought to be added to each of the four words, accrue, remain, descend, or come. And the four words are by the letter limited after the fine engrossed and proclamations made, by force of any gift in tail, or by any other cause or matter had or done before the fine levied. And so he who will take benefit of this saving, ought to prove four things, viz. that he is another person, and that the right first came to him, and that it came after the fine engrossed and proclamations made, and that his right or title is by cause or matter before the fine levied. And so the foundation of his title ought to be before the fine, and first to come after the proclamations. As for example, (upon the word acrue,) *Weston* said, if the father dies seised, his eldest son being in religion, and the youngest is desseised, and a fine is levied with proclamations, and five years pass, and afterwards the eldest is deraigned, he shall be aided by this second saving, *causâ qua supra*. So *Dyer* said, if the mortgagee is disseised, and a fine is levied by

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the disseisor, and five years pass after the proclamations, and afterwards the marg gor pays or tenders the money, he shall, by this second saving, have five years after his payment or tender; for his title first accrued to him after the proclamations by the payment or tender, upon cause or matter before the proclamations, viz. by the condition made before the fine. And if the husband levies a fine with proclamations, and five years pass after the proclamations, and afterwards the husband dies, the wife, by this second saving, shall have five years after the death of the husband to purchase her writ of dower; for her title cometh after the proclamations made, viz. by the death of her husband, upon cause before the fine, viz. the intermarriage with the husband and his seisin: for three things are the cause of the wife's dower, viz. the intermarriage, the seisin of the husband in deed or in law, and his death; two of which, viz. the intermarriage and the seisin, were before the fine levied; and the third, viz. the death, was after the proclamations."— This was questioned be *Plowden*, and with great reason; since it may be said that there was no adverse title at the time when the fine was levied. But it is clearly and expressly settled that the fine will bar the wife unless she claims within five years after the death of her husband. See *Dyer*, 72. *b*. *Damport and Wife* v. *Wright*, *Dyer*, 224. *a*. *Moor*, 53. S. C. The reason of the last case, as stated in *Dyer*, is," because the reason, ground, and matter of their [the wives] endowment, was the seisin of their husbands during the marriage, which was before the fine levied, although the action be given afterwards videlicet, after the death of the husband; wherefore they shall be excluded of their dower, if they will not prosecute for their right within the five years after action accrued." *Shep*. *Touch*. 23. " The persons whose right " is saved and preserved are mentioned in the first and " second saving of the statute of 4 *H*. 7., and they are " strangers,

"strangers, not parties nor privies. They that have "benefit by the first saving of the statute, shall have "none by the second saving. For he that will be within "the second saving, to have benefit by it, must be "1. Another person. 2. The right must come and ac- "crue to him first. 3. It must come to him after the "fine and proclamations. 4. His right must be upon "some cause or matter before the fine." 13 *Coke*, 21. *Menvil's* case. Husband seised in fee took a wife, and levied a fine with proclamations. He was outlawed of high treason and died. The conusees conveyed to the queen. Five years after the death of the husband passed: the heirs of the husband reversed the attainder, and the wife sued her petition of right. First objection, that she was barred by the fine and five years nonclaim; and as to that objection, "it was resolved, that the wife should be endowed, and that the fine with proclamations was not a bar unto her; and yet it was resolved, that the act of 4 *H*. 7. *c*. 24., shall bar a woman of her dower by a fine levied by her husband with proclamations, if the woman doth not bring her writ of dower within five years after the death of her husband; as it was adjudged *Hil*. 4 *H*. 8. *Rot*. 344., in the Common Pleas, and 5 *El*. *Dyer*, 244. For by the act, the right and title of a feme covert is saved, so that she take her action within five years after she becomes uncovert, &c. but it was resolved, the wife was not to be aided by that saving; for in respect of the said attainder of her husband of treason, she had not any right dower at the time of the death of her husband; nor can she, after the death of her husband, bring an action, or prosecute an action to recover her dower, according to the direction and saving of the said act; but it was resolved, that the wife was to be aided by another former saving in the same act, viz. the second saving. And in this case the action and right of dower accrued to the wife after the reversal of the at-

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tainder, by reason of a title of record before the fine, by reason of the seisin in fee (had), and the marriage (made), before the fine levied, according to the intention and meaning of the said act."

Benyon, in reply. It has been urged that the Plaintiff must bring himself within the first or second saving. The first applies to rights completely subsisting before the time of the fine, and of course it excludes the Plaintiff's case. But the Plaintiff's right either comes within the second saving, or it is not within the purview of the act. As to the second saving, it has been argued that the right of the lessor of the Plaintiff did not arise from any matter prior to the fine, because the will was a year after the fine, and because the Plaintiff had only a representative right, and did not acquire by the will a right then for the first time created, that the testator, *Thomas Burton*, was the sole person to be considered with reference to the statute, and that all persons claiming under him are in the same situation, which amounts merely to this, that *Thoma Burton* could not give a greater right than he himself had. But if it must be admitted that the Plaintiff is not within the second saving, because his title does not accrue by matter before the fine, yet it may fairly be contended that he does not come with the statute at all. The Defendant's argument has to contend on this point with the authority of the *Touchstone* and the other authorities there cited. The *Touchstone*, 22. says expressly, "That such as have neither present nor future right at the time, of levying the fine, but whose right groweth either entirely after, or partly before and partly after, they are not barred by the fine, and may claim when they will." The present case then is out of the act of parliament, which does not at all look to rights accruing by matter subsequent to the fine. Under the stat. 21 *Jac. c.* 16. it is not

not doubted but that the devisee has a longer time than the heir. [*Mansfield* C. J. denied this.] The authority of *Plowden*, in *Stawell* v. *Zouch*, supports *Shepherd's* assertion: it is argued on the other side, that the instances put by *Plowden* do not apply to his proposition. But that does not touch the general doctrine: the illustration may be mistaken, but the principle will remain. The termination of the life estate gave a new title to the remainder-man.

The Court relieved *Benyon* from answering the other points of the case, until they should have disposed of this.

MANSFIELD C. J. The case will now be decided upon the last point, and since it will, consequently, be unnecessary to decide on any of the points argued in the Court of King's Bench, where this objection was never touched on, it need not be at all inferred or supposed that the authority of the jugdment of that Court is in any respect impeached by this decision. We could not at present give judgment on those points, because it would first be necessary minutely to examine the old authorities, which, upon the present grounds of our decision, it is superfluous to do. If the doctrine of estates arising by disseisin is such as has been stated by the Defendant's counsel, we must lament that the law is such. Our ancestors got into very odd notions on these subjects, and were induced by particular causes to make estates grow out of wrongful acts. The reason was, the prodigious jealousy which the law always had of permitting rights to be transferred from one man to another, lest the poorer should be harrassed by rights being transferred to more powerful persons. Hence arose all the law of maintenance; which, if strictly adhered to, one does not see how a poor man could possibly at this day recover a right. We are all of opinion, that the right of entry was confined to five years

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years after the expiration of the 40 years term. The devise was to *Philip Browne* for life, with remainder to his executors for a term of 40 years. He died in 1738, and the term, which then commenced, expired in 1778. When the fine was levied, *Robert Browne* was seised in fee of the reversion; consequently, if he had lived to 1778, he and his heir would have been bound to claim within five years from 1778, in which year the 40 years expired. If he would have been bound to claim within the five years from that time, the question is, Whether he could by his will give a right to avoid this fine at a more distant period than the end of the five years. If he might, he could equally limit the estate to five hundred or five thousand men in succession, and their heirs in tail, and so keep the right of entry alive for a century or more: this would be the consequence, and a most extraordinary consequence it would be. Whether it can be so, depends upon the words of the statute of fines, which are, "The said proclamations so made, the said "fine to be a final end, and conclude as well privies as "strangers to the same." Stopping here, the question is, since a man and his heirs are barred, is a man and his devisees barred? or has the statute of wills this effect, that more time is required to bar a right of entry against a devisee than against an heir, or is not the devisee exactly in the same state as the heir? I have never before heard it disputed; and if so, he was barred at the end of five years after the 40 years. But it is said, there is a saving of future rights, and every person shall have five years from the accruer of such future rights. This depends upon the words of the statute, "Saving to all "other persons such action, right, title, claim, and in- "terest, in or to the said lands, tenements, or other "hereditaments, as first shall grow, remain, or descend, "or come to them after the said fine engrossed and pro- "clamation made, by force of any gift in the tail, or by "any

"any other cause or matter had and made before the "said fine levied; so that they take their action or pur- "sue their said right and title, according to the law, "within five years next after such action, right, title, "claim, or interest to them accrued, descended, re- "mained, fallen, or come." This is confined to persons whose future right first accrues after the fine by gift in tail or other cause or matter had and made before the fine levied. Did the title of the lessor of the Plaintiff first acrue to him after the fines, as a distinct original title, by matter before the fine? Certainly not: at the time of the fine *T. Burton* was seised in fee in reversion, and made his will after the fine levied, in which he devises the premises to *Robert Burton* for life, with remainder in tail to the lessor of the Plaintiff. His title, therefore, is a part of the same estate, the same fee, which *Thomas Burton* had at the time of the fine levied, and which first accrued before the fine: the Plaintiff is driven to contend that the words, before the fine levied, mean the same thing as, after the fine levied. But the lessor of the Plaintiff having this estate-tail, in order to bring him within the saving, it is said that the case is the same as if he had had it before the fine levied: but to hold this, would be to pervert the statute entirely, and it would have the monstrous consequence, that though the person seised at the time of the fine levied must have entered within five years after the 40 years, he could by his will give his devisee a right of entry for an hundred years. We are, therefore, of opinion, that the judgment must be affirmed, because no entry was made within five years after the expiration of the 40 years, which determined in 1778.

1809.

REGULA GENERALIS.

WHEREAS the practice that has prevailed in this court, by which in bailable actions no notices of bail, or of declaration being filed conditionally, have been necessary, is found in many instances to be attended with inconvenience. IT IS THEREFORE ORDERED, That from and after the last day of this term, in every action in which special bail shall be required, and where the declaration shall be filed conditionally, notice in writing of such declaration being so filed shall be given to the Defendant, his attorney, or agent. And in all such actions when special bail shall be put in for the Defendant, a notice in writing of such bail being so put in shall be forthwith given to the Plaintiff's attorney, or agent: and that no declaration shall be considered as filed, or special bail as put in, until such notices shall be so respectively given.

J. MANSFIELD.
J. HEATH.
S. LAWRENCE.
A. CHAMBRE.

MEMORANDUM.

IN this term *Robert Henry Peckwell*, of Lincoln's Inn, and *William Frere*, of the Middle Temple, Esquires, were called Serjeants, and took for the motto on their rings, "*Traditum ab antiquis servare.*"

END OF EASTER TERM.

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E. W. Morris, Printer, Wycombe.